Supreme Court, U. S.
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80-1188
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES EDGAR,

Appellant,

vs.

MITE CORPORATION and MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether the Illinois Business Take-Over Act conflicts with the Williams Act amendments to the Securities Exchange Act of 1934?

Whether the Illinois Business Take-Over Act regulates evenhandedly to effectuate strong legitimate local interests that outweigh the incidental effect on interstate commerce, and is valid under the commerce clause?

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ON APPEAL FROM THE UNITED STATES
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, has not been reported, but is included in the appendix at p. 32a. The opinion of the United States Court of Appeals for the Seventh Circuit is not reported, but is included in the appendix at p. 1a.

JURISDICTION

Appellees initiated this action in the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to Section 27 of the Securities and Exchange Act of

1934 (15 U.S.C. § 78aa), 28 U.S.C. §§ 1332, 1337 and 42 U.S.C. 1983, and the district court held that the Illinois Business Take-Over Act (Ill. Rev. Stat. 1979, ch. 121½, § 137.51 *et. seq.)* was unconstitutional.

The judgment of the United States Court of Appeals for the Seventh Circuit, affirming the district court, was entered on October 17, 1980. See p. 42a. A notice of appeal to this Court was duly filed on January 5, 1981, in the United States Court of Appeals for the Seventh Circuit. See p. 43a.

This appeal is being docketed in this Court within 90 days of entry of the order below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, section 8 of the United States Constitution provides in pertinent part that:

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article VI of the United States Constitution provides in pertinent part that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Illinois Business Take-Over Act, Ill.Rev.Stat. 1979, ch. 121½, § 137.51 *et seq.*

(See Appendix, p. 45a)

Williams Act amendments to the Securities Exchange Act of 1934 (15 U.S.C. § 78m(d)-(e), 78 n(d)-(f)(1976). The pertinent sections are set forth in the Appendix at 65a.

STATEMENT OF THE CASE

Appellant, James Edgar, is the Secretary of State of Illinois and is charged with the administration and enforcement of the Illinois Business Take-Over Act (Ill. Rev. Stat. 1979, ch. 121½, § 137.51 *et. seq.*) (the "Illinois Act"). MITE Corporation and MITE Holdings, Inc., (collectively "MITE") sought to make a cash tender offer for the shares of Chicago Rivet and Machine Co. ("Chicago Rivet") without having to comply with the Illinois Act. Chicago Rivet is a publicly-held Illinois Corporation with its principal executive offices in Bellwood, Illinois. Chicago Rivet has 866,264 shares of common stock outstanding and 2,181 shareholders of record. Of those shareholders, 589 are residents of Illinois, and they own 377,395 common shares.

On January 19, 1979, MITE filed a Schedule 14D-1 with the Securities and Exchange Commission (the "SEC") concerning its proposed tender offer, pursuant to section 14(d)(1) of the Williams Act, 15 U.S.C. § 78n(d)(1) (1976), and Regulation 14D promulgated thereunder. MITE's proposed tender offer of $28.00 per share for all the shares of Chicago Rivet represented a premium of more than $4.00 per share over the market price preceding announcement of the offer.

MITE initiated this action on January 19, 1979, seeking to have the district court declare the Illinois Act null and void on its face because it violated the supremacy and commerce clauses of the United States Constitution. In addition MITE sought injunctive relief prohibiting then Secretary of State Alan J. Dixon and Chicago Rivet from enforcing the Illinois Act against it in connection with its proposed tender offer.

On January 22, 1979, Chicago Rivet filed an action in the Court of Common Pleas of Blair County, Pennsylvania, alleging that MITE was in violation of the Pennsylvania Take-Over Disclosure Law, 70 Pa. Cons. Stat. Ann. tit. 70, § 71 *et seq.* (Purdon Supp. 1978). The court issued an *ex parte* order enjoining MITE from pursuing its tender offer pending further

hearing on January 26, 1979. On January 22, 1979, Chicago Rivet also filed a complaint with the Pennsylvania Securities Commission. MITE removed the action filed in the Court of Common Pleas of Blair County to the United States District Court for the Western District of Pennsylvania, and also filed a complaint seeking to have the Pennsylvania Act declared unconstitutional and to have its enforcement enjoined. On January 31, 1979, the Pennsylvania Securities Commission determined that it would not invoke the Pennsylvania Act, and on the next day the District Court for the Western District of Pennsylvania denied Chicago Rivet's motion for a temporary restraining order.

On February 1, 1979, Dixon executed a temporary cease and desist order and notice of hearing regarding the proposed tender offer and notified MITE that the order and notice would be served February 5, 1979. On February 2, 1979, the district court entered an order preliminarily enjoining Dixon from enforcing the Illinois Act against MITE in connection with its tender offer for the shares of Chicago Rivet. MITE published its tender offer to all shareholders of Chicago Rivet in the national edition of the *Wall Street Journal* on February 5.

The district court entered its final judgment order on February 9, 1979, declaring the Illinois Act to be null and void. The district court held that the Illinois Act was preempted by the Williams Act and created an undue burden on interstate commerce in violation of the commerce clause. The district court also permanently enjoined Dixon from enforcing the Illinois Act against MITE in connection with its tender offer for the shares of Chicago Rivet.

Appellant appealed to the Court of Appeals for the Seventh Circuit from the final judgment order of the district court declaring the Illinois Act to be null and void. The Court of Appeals for the Seventh Circuit affirmed, holding that the Illinois Act was preempted by the Williams Act and also constituted an undue burden on interstate commerce in violation of the commerce clause.

THE QUESTIONS ARE SUBSTANTIAL

I.

THE ILLINOIS BUSINESS TAKE-OVER ACT IS NOT INFIRM UNDER THE SUPREMACY CLAUSE BECAUSE STATE REGULATION THAT PROVIDES ADDITIONAL PROTECTION FOR THE SHAREHOLDER CONFRONTED WITH A TENDER OFFER DOES NOT CONFLICT WITH THE WILLIAMS ACT.

The question of whether the Illinois Act conflicts with the Williams Act amendments to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f)(1976), or is invalid under the commerce clause of the United States Constitution is a substantial one as the great majority of states have enacted analogous statutes regulating tender offers.[1] The validity of state regulation of tender offers under the Williams Act and commerce clause has not been treated before by this Court.[2]

This Court has said that the sole purpose of the Williams Act was to protect investors confronted with a tender offer. *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 35, 51 L.Ed.2d 124 (1977). The Williams Act is the product of the increasing use of the cash tender offer during the 1960's as a virtually unregulated method of corporate acquisition. *Id.* at 22. When Congress enacted the Williams Act the first state takeover statute had already been enacted (Va. Code §§ 13.1-528 *et seq.* (1978), effective March 5, 1968). It is significant that despite the proliferation of state takeover statutes the use of the tender offer mechanism for corporate acquisition has not been de-

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[1] See, Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L.J. 510, 514-515, n 29(1979) (hereinafter *"Tender Offer Statutes Reconsidered"*), which lists the analogous statutes enacted in 36 States.

[2] In *Leroy* v. *Great Western United Corporation*, 443 U.S. 173, 61 L.Ed. 2d 464(1979), this Court reversed on grounds of improper venue and did not pass on the validity of the Idaho statute.

terred. *AMCA International Corp.* v. *Krouse,* 482 F.Supp. 929, 938 (S.D. Ohio, 1979); *Tender Offer Statutes Reconsidered, supra,* n.1, at 523.

The Seventh Circuit Court of Appeals did not hold that Congress has expressly barred the states from regulating tender offers. This Court has said that § 28(a) of the Securities Exchange Act of 1934[3] "was plainly intended to protect, rather than to limit, state authority." *Leroy* v. *Great Western United Corp.,* 443 U.S. 173, 182, 61 L.Ed. 2d 464 (1979). The Williams Act does not contain language expressing direct preemptive intent, and on the occasions that Congress has amended the Williams Act it has not expressly preempted concurrent state regulation. *AMCA, supra,* 482 F.Supp. at 935. Nor did the Seventh Circuit Court of Appeals hold that the federal scheme of regulating tender offers is sufficiently pervasive to infer an implicit congressional intent to preempt state legislation. It is also clear that the field of securities regulation is not an area of paramount federal importance, such as national security or foreign affairs, in which federal legislation that is not pervasive will nevertheless preempt state legislation. *See Pennsylvania* v. *Nelson,* 350 U.S. 497,504-505, 100 L.Ed. 640(1956); *Hines* v. *Davidowitz,* 312 U.S. 52,67, 85 L.Ed. 581(1941). The coexistence of federal and state regulation of securities transactions is established. *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware,* 414 U.S. 117, 127, 38 L.Ed.2d 348(1973).

Absent explicit or implicit preemption, the validity of the Illinois Act depends upon whether it "stands as an obstacle to the accomplishment and execution of the full purposes and

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[3] Section 28(a), as set forth in 15 U.S.C. § 78bb(a)(1976), provides in pertinent part:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52,67,85 L.Ed. 581(1941). The Seventh Circuit Court of Appeals concluded that the Williams Act protects investors by a "market approach" and is also designed to preserve a neutral balance between incumbent management and offeror. See *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256(5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 61 L.Ed.2d 464(1979). This Court has said that "Congress was indeed committed to a policy of neutrality in contests for control, but its policy of evenhandedness does not go . . . to the purpose of the legislation . . ." which was to protect investors. *Piper, supra*, 430 U.S. at 29. As the Illinois Act provides the investor confronted with a tender offer with additional protection, supplementing that provided by the Williams Act, the fact that the balance between the respective positions of incumbent management and offeror might be affected, or that a particular offeror might not prevail in a particular tender offer does not thwart the purpose of Congress in enacting the Williams Act.

Apart from the disclosure requirements in sections 13(d) and 14(d) of the Williams Act, investors are afforded certain substantive protections. 15 U.S.C. §§ 78m(d), 78n(d). Tendering shareholders can withdraw stock within the first seven days of an offer or any time after sixty days. 15 U.S.C. § 78n(d)(5)(1976).[4] When a tender offer is for less than all of the outstanding shares, those shares tendered during the first ten days must be taken up pro rata by the offeror. 15 U.S.C. § 78n(d)(6)(1976). Finally, if the amount of consideration is later increased all tendering shareholders will receive the higher price. 15 U.S.C. § 78n(d)(7)(1976). The Seventh Circuit

[4] The SEC has extended the seven day withdrawal period contained in the Williams Act to fifteen business days. 17 C.F.R. § 240.14d-7 (1979).

Court of Appeals held that the following provisions of the Illinois Act would unduly aid incumbent management and would deter the making of tender offers to the detriment of the investor. The Illinois Act requires that an offeror file a registration statement with the Secretary of State, and that the offer will automatically become registered after 20 business days, unless the Secretary accelerates or delays the period or calls a hearing (Ill.Rev.Stat.1979, ch. 121½, § 137.54.C.,E.).[5] The Illinois Act provides for a hearing if the Secretary deems it necessary for the protection of Illinois offerees, or if one is requested by a majority of the outside directors or by Illinois residents who hold at least 10% of the shares (Ill.Rev.Stat.1979, ch. 121½, § 137.57.A.). The hearing is to commence within ten days, unless extended by the Secretary for the protection of Illinois offerees or the convenience of the parties, and the Secretary is to issue a decision within fifteen days of the hearing unless the protection of Illinois offerees requires an extension (Ill.Rev.Stat.1979, ch. 121½, § 137.57.C.,E.).

Although a tender offer will proceed at a slower pace under the Illinois Act, this does not conflict with the congressional purpose of protecting the investor, even though it may affect the respective positions of incumbent management and offeror. The element of surprise is eliminated by the pre-effective filing requirement. The element of surprise is unquestionably beneficial to the offeror. If the target company is successful in finding another bidder, the original offeror is detrimentally affected, but the Williams Act was not enacted to protect the offeror.

The closer scrutiny of an offer under the Illinois Act and the provision for a hearing before the Secretary of State necessitate some delay, but this is necessary to protect the

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[5] The 20 day pre-offer filing required under the Illinois Act conflicts directly with the SEC's new Rule 14-d-2. 17 C.F.R. § 240.14d-2b. The Seventh Circuit Court of Appeals did not rely on the new SEC rules because those rules do not apply to tender offers made prior to their effective date. 44 Fed. Reg. 70326 (1979). Cf. *AMCA, supra*, 482 F. Supp. at 933-34, n.4.

shareholder and does not unduly inhibit the making of tender offers. Although the respective ten and fifteen day periods for holding a hearing and issuing a determination can be extended by the Secretary if necessary, they certainly constitute a guideline within which the Secretary would act in an ordinary case. Of course during the whole period the activities of incumbent management are also covered by the Illinois Act (Ill.Rev.Stat. 1979, ch. 121½, §§ 137.55., 137.58.(1)-(3), 137.62.B., 137.63.A.,B.). As noted earlier the use of the tender offer as the preferred method for corporate acquisition has not diminished during the proliferation of state takeover legislation. The opponents of the Williams Act predicted it would have a crippling effect upon offerors, but it has been suggested that the Williams Act had no impact on the relative strength of management and the offeror.[6]

The protection afforded investors from review by the Secretary of State is consistent with the purpose of the Williams Act, and any shift in the respective positions of incumbent management and offeror is immaterial when the longer duration is not inimical to the interests of the shareholder. The type of review by the Secretary of State under the Illinois Act cannot be deemed a deviation from a market approach. The Seventh Circuit Court of Appeals, however, said that the Illinois Act replaced the autonomy of the investor with a "benevolent bureaucracy" because section 137.57.E. provides in pertinent part that:

> If the Secretary finds that the take-over offer fails to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, *or that the take-over offer is inequitable or would work or tend to work a fraud or deceit upon the offerees,* . . . the Secretary shall by order deny the registration of the take-over offer or condition its registration upon certain changes or modifications . . . (emphasis added) Ill.Rev.Stat.1979, ch. 121½, § 137.57.E.

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[6] Shipman, *Some Thoughts About The Role Of State Takeover Legislation: The Ohio Takeover Act,* 21 Case Western L. Rev. 722, 760-61(1970).

The Seventh Circuit Court of Appeals said that inclusion of "or that the take-over offer is inequitable" empowers the Secretary to pass on the substantive fairness of the offer. The foregoing section does not empower the Secretary of State to judge the substantive fairness of the amount of the premium over the market price, which remains the unfettered decision of the investor. The word "inequitable" is coupled with "fraud" and "deceit" and simply does not put the Secretary in the position of looking at the amount of the offer. Review by the Secretary of whether there has been full disclosure, or whether the offer would be inequitable or work a fraud or deceit protects the shareholder who, in the absence of incomplete or misleading disclosure or fraud, will decide whether to tender his shares. Protecting the shareholder against fraud is not inconsistent with the Williams Act, which contains anti-fraud provisions. 15 U.S.C. §§ 78m(e), 78n(e)(1976).

II.

STATE TAKEOVER LEGISLATION WHICH REGULATES EVENHANDEDLY TO EFFECTUATE LEGITIMATE LOCAL INTERESTS, THAT OUTWEIGH THE INCIDENTAL EFFECT ON INTERSTATE COMMERCE, DOES NOT CONTRAVENE THE COMMERCE CLAUSE.

State legislation serving legitimate local interests that does not discriminate against interstate commerce is valid under the commerce clause even though it affects commerce. *Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429, 440, 54 L.Ed.2d 664(1978). In *Raymond* this Court quoted the established rule that:

> '[I]n areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the Court in the absence of congressional guidance is called upon to make "delicate adjustment of the conflicting state and federal claims." ' (citations omitted) *Id.* at 440.

The test used in making the "delicate adjustment" is contained in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L.Ed.2d 174(1970), in which this Court said that:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

In its decision, the Seventh Circuit Court of Appeals said that Illinois' interest in protecting resident shareholders and regulating control transfers are tenuous and cannot justify the Illinois Act's effect on interstate commerce. Chicago Rivet is an Illinois corporation with its principal executive office in Illinois. Over 43% of Chicago Rivet's common stock is held by the 27% of its shareholders who are residents of Illinois. The Seventh Circuit Court of Appeals said that the Illinois Act would have applied even if no shareholder of Chicago Rivet resided in Illinois. A "target company" under the Illinois Act is one in which 10% of the shares are held by securityholders located in Illinois, or that meets two of the following conditions: (a) has its principal executive office in [Illinois]; (b) is organized under the laws of [Illinois]; (c) has at least 10% of its stated capital and paid-in surplus represented in [Illinois] (Ill.Rev.Stat. 1979, ch. 121½, § 137.52-10). If no shareholders resided in Illinois, however, the Secretary could exempt the offer from registration as not necessary for the protection of Illinois securityholders (Ill.Rev.Stat.1979, ch. 121½, § 137.52-9(5)). Protecting investors residing in a state has long been recognized as a legitimate state objective. *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539,551, 61 L.Ed. 480(1917); *AMCA, supra*, 482 F. Supp. at 939.

Illinois has a second legitimate local interest in regulating the internal affairs transactions of Illinois or Illinois based corporations with substantial contacts in the State. Illinois can regulate the internal affairs of an Illinois corporation in matters such as a merger or other fundamental corporate changes, shareholder liability and election of directors. See Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 Case Western Reserve L.Rev. 722, 742-5 (1970). A tender offer is sufficiently analogous to traditional internal affairs transactions of a corporation which are the subject of state regulation. A successful tender offer means a shift in control in which the initial step is a change in the directors or their policies. A tender offer is like a de facto proxy solicitation because the securityholder who retains some of his shares is also "electing future directors and determining future board policy to govern the remainder of his securities." Shipman, *supra,* at 744. Congress recognized that tender offers are functionally equivalent to proxy fights. H.R. Rep. No. 1711, 90th Cong. 2d Sess (1968). A securityholder who retains his shares in effect receives new shares with a reduction in his voting power. A tender offer does not, however, result in a change in the formal corporate structure, and there is an absence of action contractually binding all shareholders at the corporate level such as in a merger. But a successful offeror will acquire a fiduciary relationship to the corporation and its securityholders. The offeror will obtain control through the securityholders acting in unison via the mechanism of the tender offer. The cumulative effect of a tender offer so closely resembles a proxy solicitation that Illinois can regulate a tender offer as an internal affair of an Illinois or Illinois based corporation. Shipman, *supra,* at 745.

In its decision the Seventh Circuit Court of Appeals said that had the Secretary of State not been enjoined over 23 million dollars of interstate commerce would have been affected. The burden of compliance with the Illinois Act, however, is

not such that would prevent the free flow of interstate commerce. Although the possibility exists that in a particular case more than one state would invoke jurisdiction, the Illinois Act contains a comity provision, which provides that when the Secretary determines that another jurisdiction is applying a statute which affords substantially equal protection, the registration and filing requirements of the Illinois Act will not apply (Ill.Rev.Stat.1979, ch. 121½, 137.53.). The unavoidable extraterritorial effect of the Illinois Act is also tempered by the fact that the vast majority of states also have takeover statutes. The requirements of the Illinois Act do not impose a substantial burden on interstate commerce because they are hardly of a magnitude to dissuade a company from proceeding with such a major business decision as that of acquiring another company.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

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In the

United States Court of Appeals

For the Seventh Circuit

No. 79-1267

MITE CORPORATION AND MITE HOLDINGS, INC.,

Plaintiffs-Appellees,

v.

ALAN J. DIXON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-C-200—John Powers Crowley, *Judge.*

ARGUED NOVEMBER 9, 1979—DECIDED OCTOBER 17, 1980

Before SPRECHER and CUDAHY, *Circuit Judges,* and DUMBAULD, *Senior District Judge.**

CUDAHY, *Circuit Judge.* The possibility—and perhaps probability—that different levels of government will take quite dissimilar approaches to similar problems is inherent in federalism. But these divergences are not necessarily dysfunctional; the states in our federal system have long served as laboratories of social experiment—free, within limits, to evolve strategies of their own to meet pressing problems. State prerogatives, however, must remain necessarily circumscribed by the unifying requirements of the national authority as fixed in the Constitution. When Congress has spoken definitively (within its constitutional sphere), state legislatures may not act to obstruct or unsettle the congressional design.

* The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, is sitting by designation.

The appeal in the instant case presents the enduring problem of defining the limits of state power within the constraints of national legislation—here involving securities regulation. Specifically, the question before us is whether the Illinois Business Take-Over Act, Ill. Rev. Stat. ch. 121½, § 137.51 *et seq.* (1979) (the "Illinois Act" or the "Act"), both facially and as applied, may stand under the supremacy and commerce clauses of the United States Constitution and the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78a *et seq.* (1976), as amended by the Williams Act.[1] The district court held the Illinois Act to be unconstitutional. We affirm.

I. FACTS

The basic facts relevant to this appeal though lengthy are undisputed. Plaintiffs-appellees MITE Corporation and MITE Holdings, Inc., are Delaware corporations with their principal executive offices in New Haven, Connecticut. MITE Holdings, Inc. is a wholly-owned subsidiary of MITE Corporation (collectively, "MITE"). Defendant-appellant Alan J. Dixon is the Secretary of State of Illinois and is charged with the administration and enforcement of the Illinois Act. Chicago Rivet & Machine Co. ("Chicago Rivet"), a defendant below but not a party to this appeal, is a publicly-held Illinois corporation with its principal executive offices in Bellwood, Illinois. Chicago Rivet has 866,264 shares of common stock outstanding and 2,181 shareholders of record. Of those shareholders, 589 are residents of Illinois, and they collectively own 377,395 common shares. Chicago Rivet's common stock is traded on the American Stock Exchange.

The scenario for the ensuing legal confrontations opens on January 19, 1979, with MITE preparing to commence a cash

[1] Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976)).

tender offer[2] for all outstanding shares of Chicago Rivet common stock. Pursuant to Section 14(d)(1) of the Williams Act, 15 U.S.C. § 78n(d)(1) (1976), and Regulation 14D promulgated thereunder, MITE filed a Schedule 14D-1 with the Securities and Exchange Commission (the "SEC"). The Schedule 14D-1 indicated MITE's willingness to pay $28.00 per share for all shares of Chicago Rivet common tendered to it, a premium of more than $4.00 per share over the market price in the period immediately preceding announcement of the offer.

The same day it filed its Schedule 14D-1 with the SEC, MITE also commenced the instant action in the district court, seeking to have the Illinois Act declared null and void on its face becasue it violated the supremacy and commerce clauses of the United States Constitution. In addition, MITE sought a temporary restraining order, a preliminary injunction and a permanent injunction prohibiting Secretary of State Dixon and Chicago Rivet from enforcing the Illinois Act against it in connection with the proposed tender offer.

The scene then shifted to the courts of Pennsylvania. On January 22, 1979, Chicago Rivet filed a complaint in equity in the Court of Common Pleas of Blair County, Pennsylvania, seeking to enjoin MITE from proceeding with its proposed tender offer because MITE was purportedly in violation of the Pennsylvania Takeover Disclosure Law, 70 Pa. Cons. Stat. Ann. tit. 70, § 71 *et seq.* (Purdon Supp. 1978) (the "Pennsylvania Act"). Chicago Rivet alleged that MITE's proposed tender offer was subject to the Pennsylvania Act because Chicago Rivet had its principal place of business and substantial assets in Pennsylvania. The court granted Chicago Rivet the relief it requested, issuing an *ex parte* order enjoining MITE from proceeding with the tender offer pending a further hearing on January 26, 1979.

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[2] "A tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price." Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1251 (1973).

In addition to initiating its action in Blair County on January 22, 1979, Chicago Rivet that same day also filed a complaint before the Pennsylvania Securities Commission, requesting that that Commission enforce the Pennsylvania Act against MITE. Meanwhile, back in the Northern District of Illinois, still on January 22, Chicago Rivet moved the district court in the instant action to dismiss MITE's challenge to the Illinois Act on the ground that no case or controversy existed between the parties. Chicago Rivet represented to the court that it had no present intention of invoking the Illinois Act, and Secretary of State Dixon represented that he had not decided whether MITE's offer should be exempt from the Act. Pursuant to those representations and by the consent of the parties, the district court ordered that neither Chicago Rivet nor Secretary Dixon would be allowed to initiate any action against MITE under the Illinois Act without first indicating a written intention to do so at least two business days before the proposed action was to be instituted. The district court further ordered that MITE's requests for injunctive relief were to be continued until further notice.

The following day, January 23, 1979, the action once more moved to Pennsylvania. MITE removed the action Chicago Rivet had filed in the Court of Common Pleas of Blair County to the United States District Court for the Western District of Pennsylvania, and on January 24 MITE filed its own complaint in the latter forum seeking to have the Pennsylvania Act declared unconstitutional and to have its enforcement by either Chicago Rivet or the Pennsylvania Securities Commission enjoined. Those two actions were consolidated by the federal district court in Pennsylvania.

On January 31, 1979, the Pennsylvania Securities Commission determined that it would not enforce the Pennsylvania Act against MITE's proposed tender offer, and on February 1 the District Court for the Western District of Pennsylvania denied Chicago Rivet's motion for a temporary restraining order. Apparently sensing that the tide of battle in Pennsylvania had

turned, defendants then quickly moved to proceed again under the Illinois Act. On February 1, 1979, defendant Dixon issued a temporary cease and desist order and notice of hearing regarding the proposed tender offer. Dixon concluded that MITE was about to violate the Illinois Act by commencing its offer. He notified MITE that he intended to issue an order to it to "cease and desist all further action to make a tender offer" for Chicago Rivet. This order, together with the accompanying notice, was to be served on February 5.

On February 2, 1979, Chicago Rivet notified MITE by letter that it would file suit in the Circuit Court of Cook County, Illinois, to restrain the proposed tender offer because MITE was violating the Illinois Act.

In response to defendants' decisions to invoke the Illinois Act, MITE renewed its request for relief before the district court. Judge Crowley entered an order on February 2 preliminarily enjoining defendant Dixon from issuing a cease and desist order or notice of hearing, or from otherwise enforcing the Illinois Act against MITE. MITE then published its tender offer in the national edition of the *Wall Street Journal* on February 5. The tender offer, which represented a proposed transaction in interstate commerce in excess of $23,000,000, was made to all of the shareholders of Chicago Rivet residing throughout the United States, including those residing in Illinois.

The district court entered its final judgment order in the instant action on February 9, 1979. The order declared the Illinois Act to be null and void because it was preempted by the Williams Act and because it created an undue burden on interstate commerce in violation of the commerce clause. The district court also permanently enjoined enforcement of the Illinois Act against MITE in connection with its proposed tender offer. From the judgment of the district court, defendant Dixon now appeals.

MITE withdrew its February 5, 1979 tender offer, and the record does not indicate whether MITE intends to make another tender offer for Chicago Rivet's shares. Nevertheless, if this court were to reverse the judgment of the district court, MITE would face both criminal and civil liability for making the February 5, 1979 offer in violation of the Illinois Act. *See* Illinois Rev. Stat. ch. 121½, §§ 137.63-137.65 (1979). Since the Secretary has indicated that he intends to enforce the Act against MITE, the issues before us are not moot.

II. PREEMPTION

The determination whether a challenged state statute is void under the supremacy clause is notoriously complicated. "No simple formula can capture the complexities of this determination; the conflicts which may develop between state and federal action are as varied as the fields to which congressional action may apply." *Goldstein* v. *California*, 412 U.S. 546, 561 (1973). Prior cases do not always furnish precise guidelines in resolving a particular controversy, "for each case turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973). Nonetheless, over the years the general tests to be applied in adjudicating questions of preemption have become reasonably well established. As the Fifth Circuit noted in *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1274 (1978), *rev'd on venue grounds sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979), those tests were summarized by the Supreme Court in *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-26 (1977):

> The first inquiry is whether Congress, pursuant to its power to regulate commerce, U.S. Const., Art. 1, § 8, has prohibited state regulation of the particular aspects of commerce involved in this case. . . . [W]hen Congress has "unmistakably . . . ordained," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated

in the statute's language or implicitly contained in its structure and purpose. *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Rice* v. *Santa Fe Elevator Corp.*, [331 U.S. 218,] 230 [1947].[3]

Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way if firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). *Accord, De Canas* v. *Bica*, 424 U.S. 351, 363 (1976); *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971); *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra*, at 141; *id.*, at 165 (White, J., dissenting). This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. *See De Canas* v. *Bica, supra*, at 363-365; *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 408 (S.D.N.Y. 1964), *appeal dismissed*, 382 U.S. 111 (1965), *aff'd on further consideration*, 364 F.2d 241 (CA2 1966), *cert. denied*, 385 U.S. 1036 (1967).

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[3] With respect to the possibility of implicit preemption, the Fifth Circuit observed in *Great Western United Corp.* v. *Kindwell, supra*, 577 F.2d at 1274, n.38, that

> In *Rice*, the [Supreme] Court discussed some circumstances that show an implicit Congressional desire to preempt all state regulation in a given field:
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> > The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.
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> *Rice* v. *Santa Fe Elevator Corp.*, 1947, 331 U.S. 218, 230. *Accord, Pennsylvania* v. *Nelson*, 1956, 350 U.S. 497, 502-05.

Congress has not chosen in the Securities Exchange Act of 1934 expressly to bar the states from regulating tender offers. Indeed, the Supreme Court has noted that § 28(a) of the 1934 Act[4] "was plainly intended to protect, rather than to limit, state authority." *Leroy* v. *Great Western United Corp., supra,* 443 U.S. at 182.[5] Nor is the federal scheme of regulating tender offers so pervasive that an implicit congressional intent to preempt parallel state legislation may fairly be inferred. As discussed *infra,* the Williams Act is essentially a minimum disclosure statute. It is not analogous, for example, to the detailed and comprehensive scheme of federal regulation of aircraft noise which led to a finding of preemption in *City of Burbank* v. *Lockheed Air Terminal, Inc.,* 411 U.S. 624 (1973).[6]

Of course, even federal legislation that is not pervasive will preempt supplemental state enactments if Congress has legislated in an area of paramount federal importance. In the realms of national security and foreign affairs, state legislation has been held implicitly preempted because both areas are of

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[4] Section 28(a), as set forth in 15 U.S.C. § 78bb(a) (1976), provides in pertinent part:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

[5] Section 28 was primarily designed, however, to preserve state Blue Sky laws. *Kidwell, supra,* 577 F.2d at 1275, n.39. *See* Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency,* 62 Cornell L.Rev. 213, 247 (1977) (hereinafter "Langevoort").

[6] *See* Langevoort, *supra* n.5, at 248. *But see,* Wilner and Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality,* 45 Fordham L. Rev. 1, 29 (1976); Note, *Commerce Clause Limitations upon State Regulation of Tender Offers,* 47 S. Cal. L. Rev. 1133, 1163-66 (1974); Note, *The Effect of the New SEC Rules on the Constitutionality of State Takeover Statutes,* 8 Fordham Urb. L. J. 913, 930-31 (1979-80) (suggesting that the Williams Act constitutes a pervasive scheme of federal regulation if considered together with the new SEC tender offer rules, discussed *infra*).

unquestionably vital significance to the nation as a whole. *See Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956) (national security); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941) (foreign affairs). But federal securities regulation is not of equivalent paramountcy, as an area of federal concern, to the security of the nation or to the conduct of its international relations. On the contrary, the absence of an exclusive federal interest in the field of securities regulation is persuasively demonstrated by the historically coordinate role of state regulation in the field.[7]

Thus, in the absence of explicit or implicit preemption, our task is to determine whether the Illinois Act conflicts with the Williams Act, to ascertain "whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977). *Accord, De Canas* v. *Bica*, 424 U.S. 351, 363 (1976); *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141; *id.*, at 165 (White, J., dissenting). A careful comparison of the terms of the Williams Act with the Illinois Act is accordingly requisite. *Cf. Perez* v. *Campbell*, 402 U.S. 637, 644 (1971).

The Williams Act is a product of the economic boom of the 1960's. During that period of business growth and corporate acquisition by conglomerates and others, the cash tender offer first came into vogue as a favored method for corporate takeovers. *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 22 (1977). Passage of the Williams Act was designed to close the gap in the disclosure requirements of the federal securities laws by bringing cash tender offers, which theretofore stood virtually unregulated, within the ambit of federal securities regulation. *Id.*[8]

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[7] "Congress, in the securities field, has not adopted a regulation system wholly apart from and exclusive of state regulation." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 137 (1973).

[8] *See generally* S. Rep. No. 550, 90th Cong., 1st Sess. 2-4 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess., 2-4 (1968).

The dominant theme of the Williams Act is the protection of investors. *Piper* v. *Chris-Craft Industries, Inc., supra* at 29. As the Supreme Court remarked in *Piper:*

> In introducing the [Williams Act] on the Senate floor, the sponsor, Senator Williams, stated:
>
> > "This legislation will close a significant gap in *investor protection* under the Federal securities laws by requiring the disclosure of pertinent information *to stockholders* when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities." 113 Cong. Rec. 854 (1967) (emphasis supplied [by the Supreme Court].)

430 U.S. at 26.

Investors are protected under the Williams Act through what has been termed a "market approach." "The function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then *to let the investor decide for himself." Kidwell, supra,* 577 F.2d at 1276 (emphasis supplied).

The principal disclosure provisions of the Williams Act are sections 13(d) and 14(d). 15 U.S.C. §§ 78m(d), 78n(d) (1976). Section 13(d) requires that a purchaser of any equity security registered pursuant to Section 12 of the 1934 Act file a Schedule 13D[9] with the SEC within 10 days after its purchases have exceeded 5% of the outstanding shares of the security. The Schedule 13D mandates disclosure, *inter alia,* of the background and identity of the purchaser, the source and amount of funds for the purchase, the number of shares owned and of any plans to materially alter the target corporation's business or corporate structure (if the intent of the purchases is to obtain control). Section 14(d), more immediately relevant to the instant case, is designed to insure informed shareholder decisionmaking in the face of a tender offer by requiring that a tender offeror file a Schedule 14D-1[10] with the SEC and furnish

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[9] 17 C.F.R. § 240.13d-101 (1979).

[10] 17 C.F.R. § 240.14d-100 (1979).

to the target's shareholders all material information which it contains. The disclosures required in a Schedule 14D-1 are essentially similar to those required by a Schedule 13D.

The Williams Act also contains a number of substantive protections for stockholders who elect to tender their shares. First, tendering shareholders are given the right to withdraw their tender of stock within the first seven days of an offer and, if the offeror has not yet purchased their shares, at any time after 60 days from the date the offer commenced. 15 U.S.C. § 78n(d)(5) (1976).[11] Second, if the total number of shares tendered exceeds the number sought, those shares tendered during the first ten days of the offer must be taken up pro rata by the offeror. 15 U.S.C. § 78n(d)(6) (1976). Finally, if the initially offered consideration is later increased during the course of the offer, all tendering shareholders must receive the higher price. 15 U.S.C. § 78n(d)(7) (1976).

Turning to the Illinois Act, even the most cursory perusal reveals that it contains a number of provisions which are not to be found in the Williams Act. From the fact that the two statutes differ, MITE suggests at least by implication that a preemptive conflict must necessarily exist. That argument is simplistic; mere differences between state and federal regulation of the same subject are not conclusive of preemption. No one disputes that the two statutes differ. But the crucial inquiry is whether the Illinois Act differs from the Williams Act in such a way that achievement of the congressional objective of investor protection is frustrated. *Hines* v. *Davidowitz, supra.*

In this regard the most troublesome portion of the Illinois Act is a provision contained in the hearings section of the Act, § 137.57.E, which provides:

> If the Secretary [of State] finds that the take-over offer fails to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, *or that the take-over offer is inequitable* or would work or tend to work a fraud or deceit upon the offerees, or that the

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[11] The initial seven day withdrawal period contained in the Williams Act was recently extended to fifteen business days by the SEC. 17 C.F.R. § 240.14d-7 (1979).

take-over offer will not be made to all offerees in this State on substantially equal terms, or that the take-over offer would violate this Act, the Secretary shall by order deny the registration of the take-over offer[12] or condition its registration upon certain changes or modifications. If the Secretary finds that the take-over offer provides full and fair disclosure to the offerees of all material information concerning the take-over offer, and that the take-over offer is made to all offerees in this state on substantially equal terms *and the Secretary does not find that the offer is inequitable* or would work or tend to work a fraud or deceit upon offerees in this State, or would violate this Act, the Secretary shall by order register the take-over offer. Registration of the take-over offer does not constitute approval of the offer by the Secretary (emphasis supplied).

Ill. Rev. Stat. ch. 121½ § 137.57.E (1979).

The Illinois Act thus empowers the Secretary of State to pass upon the substantive fairness of a tender offer and to prohibit it from going forward, if, in his sole opinion, he judges the offer "inequitable." Dixon defends this provision on the ground that "allowing for review by a neutral state administrator while the securityholders have time to consider the offer" will not result in unnecessary delay. Appellant's Brief at 17. This defense, however, is inadequate because it responds to the wrong challenge. Illinois' substitution of the judgment of its Secretary of State for an investor's own assessment of the equitability of a tender offer is patently inconsistent with the Williams Act, but not primarily because the state statutory process may unduly slow the progress of tender offers. Rather, this approach to investor protection by "benevolent bureaucracy" is preempted by the conflicting approach of the Williams Act, which contemplates unfettered choice by well-informed investors. Both the House and Senate Reports observed that "[t]his bill is designed to make the relevant facts known so that shareholders have a fair opportunity to make *their* decision." H.R. Rep. No. 1711, 90th Cong., 2d Sess. 3 (1968); S. Rep.

[12] Any person publishing an unregistered take-over offer is subject to criminal prosecution. Ill. Rev. Stat. ch. 121½, §§ 137.54, 137.63 (1979).

No. 550, 90th Cong., 1st Sess. 3 (1967); [1968] U.S. CODE CONG. & AD. NEWS at 2813 (emphasis supplied).[13]

The state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress. Congress contemplated only that investors be protected from acting in ignorance, not from their own well-informed choice. Thus, to the extent that Illinois has chosen to rely upon its Secretary of State's judgment rather than upon investors' own judgment after full disclosure of the relevant facts, its regulatory scheme stands in fundamental conflict with federal law and is therefore unconstitutional. *Cf. Kidwell, supra* at 1279.[14]

Because it potentially affords the target company's management a powerful weapon to stymie indefinitely a takeover,

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[13] Federal disclosure legislation employing "market" approach does not necessarily preempt other state statutes incorporating regulatory approach, e.g. Blue Sky laws. See note 5 *supra;* Langvoort, *supra* note 5 at 247. In this connection, our finding that the Illinois Act is preempted by the Williams Act finds support, *inter alia,* in the enactment of the Williams Act prior to the Illinois Act and in the extraterritorial impact of the Illinois Act. See part III *infra.*

[14] When the Williams Act was under consideration, even the SEC did not suggest that it be granted the authority to weigh the substantive fairness of a tender offer. As then SEC Chairman Cohen stated:

> We do not wish to imply . . . that the Commission should have power or responsibility to pass on the merits of a particular acquisition or proposal. As in most other areas entrusted to it, the Commission's responsibility should be limited to requiring appropriate disclosures.

Hearings on S.510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 33 (1967).

See also Securities and Exchange Commission, *The Work of the Securities and Exchange Commission* 2 (1974); Note, *The Indiana Business Takeover Act,* 51 Ind. L. J. 1051, 1096-97 (1976).

another provision of the Illinois Act relating to hearings is also unacceptable.[15] This provision forms an additional obstacle to the congressionally-mandated purpose that shareholders be free within a reasonable time[16] to accept a tender offer they deem fair (after full disclosure). Thus, Section 137.57.A provides:

> The Secretary shall call a hearing if the Secretary deems necessary for the protection of offerees in this State or if within 15 business days after the date of filing the registration statement a written request for a hearing is submitted to the Secretary, by a majority of the directors of the target company who are not officers or employees of the target company or by a person or persons who are located in this State as determined by post office address as shown on the records of the target company and who hold of record or beneficially, or both, at least 10% of the outstanding shares of any class of equity securities which is the subject of the take-over offer.

Ill. Rev. Stat. ch. 121½, § 137.57.A (1979).

Although Illinois apparently did not *intend* to accord incumbent management the right to require the holding of hearings, the effort to disarm management is not realistically assured of success. It still seems likely that in a significant number of cases management will be able to use the provision, either through its ability to influence outside directors, or because it will, directly or indirectly, exercise some (or a great deal of) control over the required number of outstanding shares. Since the interests of the target company's management at the time of a tender offer are likely to be adverse to those of the offeror (and conceivably the shareholders),[17] anything which suggests delegation to management of the right to call

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[15] For a discussion of the objectives of maintaining a balance between the target company's management and the offeror in the context of investor protection, *see infra*.

[16] The Act does not fix any time within which hearings must be completed. Presumably they might be extended indefinitely. Ill. Rev. Stat. ch. 121½, § 137.57 (1979).

[17] *See* Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L. J. 510, 531 (1979) (hereinafter "*Tender Offer Statutes Reconsidered*").

hearings (of potentially indefinite duration) does not further the congressional goal of insuring freedom of action of informed stockholders. It may be acceptable in some way, and with appropriate justification, to require hearings on the request of persons other than a public official. But in general, any delegation of the right to call hearings to private parties potentially (but realistically) subject to management influence or direction must be regarded as suspect.[18]

The hearing provision, together with the Act's 20-day pre-effective filing requirement,[19] are also subject to more general attack on the ground that they may result in unacceptable delay (which, in the case of hearings, might be interminable). This delay will allegedly enhance incumbent management's ability to defeat a tender offer, to the detriment of investors. Two schools of thought have emerged with respect to the relationship among state takeover statutes as engines of delay, the possible inhibition or withdrawal of tender offers (primarily as a result of delay), and preemption under the Williams Act. On the one hand, most courts, including the Fifth Circuit in *Kidwell*, have reasoned along the following lines: the Williams Act was designed both to protect shareholders and to preserve a neutral balance between incumbent management and offeror. Because state takeover statutes hinder the successful completion of tender offers by providing management with a powerful weapon of delay, such statutes "[disrupt] the neutrality indispensable for the proper operation of the federal market

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[18] We are, of course, addressing here only requests which would mandatorily trigger hearings. Mere precatory requests are quite distinguishable and, in and of themselves, acceptable.

[19] Illinois Act § 137.54, which provides in pertinent part:

> E. A take-over offer shall become registered [and thereby effective] 20 business days after the date of filing the registration statement or an amendment thereto with the Secretary, unless accelerated by order or delayed by written notification, or unless prior thereto the Secretary calls a hearing with respect to the offer.

Ill. Rev. Stat. ch. 121½, § 137.54.E (1979).

approach," and therefore "[stand] as . . . obstacle[s] to the accomplishment and execution of the full purposes and objectives' of the Williams Act." *Kidwell, supra* at 1279-80.[20]

On the other hand, at least one court, and several commentators, have taken issue with the Fifth Circuit's approach.[21] They argue, citing the Supreme Court, that "the sole purpose of the Williams Act was the protection of investors. . . ." *Piper* v. *Chris-Craft, supra* at 35. Hence they reject the further contention that Congress sought to legislate affirmative regulatory neutrality between the combatants in a tender offer situation. In this conclusion, they rely, *inter alia,* on an observation of the Supreme Court in *Piper,* that "Congress was indeed committed to a policy of neutrality in contests for control, but its purpose of evenhandedness does not go . . . to the purpose of the legislation. . . . Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors." 430 U.S. at 29. One commentator has summarized this position as follows:

> Any balance that emerged from the Williams Act was neither a "purpose" nor an "objective" of its draftsmen, but rather a byproduct of the congressional desire to "require full and fair disclosure for the benefit of investors." The fact that the state statutes may alter this balance is therefore an inappropriate basis for statutory preemption. Only if state regulation of tender offers

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[20] *Accord, Telco Marketing Services, Inc. v. Hospital Finance Corp.,* No. 79-C-2343 (N.D. Ill. June 11, 1979); *Brascan Ltd.* v. *Lassiter,* No. 79-1253 (E.D. La. May 3, 1979); *Dart Industries Inc. v. Conrad,* 462 F. Supp. 1 (S.D. Ind. 1978); *Daylin v. Uarco,* No. 78-C-4246 (N.D. Ill. Nov. 27, 1978). *See also,* Note, *The Indiana Business Takeover Act, supra* n.13, at 1092.

[21] *See AMCA International Corp.* v. *Krouse,* 482 F. Supp. 929 (S.D. Ohio 1979); *cf Telvest, Inc.* v. *Bradshaw,* 618 F.2d 1029 (4th Cir. 1980). *See also* Note, *Preemption and the Constitutionality of State Tender Offer Legislation,* 54 Notre Dame Law. 725, 734-35 (1979); Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western,* 53 N.Y.U.L. Rev. 872, 914-15 (1978) (hereinafter "*A Response to Great Western*").

> conflicts with the true purpose and objective of the Williams Act—investor protection—should the state laws be held to be preempted (footnotes omitted).

Tender Offer Statutes Reconsidered, supra n.16, at 522-23.

But the inadequacy in this point of view seems to lie in its implicit assumption that the "goals" of investor protection and evenhanded regulation are necessarily distinct and, to a significant degree, unrelated. It does not seem to us that they are. Rather, inhibitions on tipping the regulatory balance, particularly on tilting toward incumbent management, are important because maintenance of an equitable balance between the contending sides is perceived as a principal means of investor protection. For if the weapons in management's arsenal are drastically augmented, the vigor of the tender offer device will at some point be impaired, denying protection to stockholders in an obvious dimension: the right to tender their shares at a premium. Thus, in its concern for investors, Congress was necessarily committed to maintaining, where appropriate, the basic capability of offerors to make successful tender offers (as well as, of course, maintaining the free flow of information to stockholders both from offerors and from management).[22]

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[22] The legislative history of the Williams Act is replete with references to the necessity of avoiding undue interference with tender offers (so as not to injure investors). The following interchange between Senators Javits and Williams on the Senate floor is particularly revealing.

> Mr. JAVITS. One other question I should like to ask the Senator: There is no intendment in the measure, or in the fact that the measure is offered, to in any way condemn the practice of making tenders, is there? Sometimes stockholders do very well because of tenders, especially competitive tenders.
>
> Mr. WILLIAMS of New Jersey. There is no intention in any way to prohibit tender offers. As a matter of fact, I think it might encourage them. Through this legislation people will have more information, and will be able to intelligently decide whether to accept a tender offer and sell their shares to a group which may wish to obtain a controlling interest.

113 Cong. Rec. 24665 (1967). Senator Javits also later remarked in the same discussion:

(Footnote continued on following page)

Turning again to the Illinois Act, any conclusion as to the actual effect it has had, or may have, on tender offers in Illinois would be purely speculative because the record is devoid of evidence on that subject. It is obvious from the face of the statute, however, that tender offers subject to the Act may proceed at a much slower pace than if they were regulated exclusively under the Williams Act. As indicated, the Illinois Act provides that a tender offer does not become effective until 20 business days after the offeror has filed a registration

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(Footnote continued from preceding page)

> I gather that the point of the Senator from New Jersey [Senator Williams] and the Senator from California [Senator Kuchel] is that this is at least a beginning in keeping up with getting adequate representation and adequate information on the part of the stockholder, who could conceivably be imposed upon, *without denying him the opportunities which result from the competitive bidding for a block of stock of a given company.*
>
> 113 Cong. Rec. 24665-66 (1967) (emphasis supplied).

In a similar vein, Senator Williams observed on an earlier occasion that

> This measure is not aimed at obstructing legitimate takeover bids. In some instances, a change in management will prove a welcome boon for shareholder and employee, and in a few severe situations it may be necessary if the company is to survive.
>
> I have taken extreme care with this legislation to balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror. The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case. . . .
>
> With this in mind, I am certain that this amendment to the Securities Exchange Act will benefit the interests of America's more than 20 million shareholders and will not serve as a device to protect an inefficient management from a legitimate takeover bid.
>
> 113 Cong. Rec. 854-55 (1967).

statement concerning the offer with the Secretary of State. *See* n.18, *supra*. By contrast, the Williams Act contains no such prenotification requirement. Indeed, Congress has repeatedly rejected a series of prenotification proposals.[23]

The Illinois Act also prevents a tender offer from going forward until after completion of a hearing, in the likely event that one is requested. *See* p. 17, *supra*. A request for a hearing need not be made until 15 business days after the offeror's registration statement has been filed, need not commence until 10 business days after the hearing request was received, and may last indefinitely. Ill. Rev. Stat. ch. 121½, § 137.57 (1979). Once the hearing has been concluded, the Secretary of State is accorded an additional 15 business days to make a decision, which he may extend. *Id.* By contrast, no hearings are contemplated or required under the Williams Act.

Extended delay potentially threatens the viability of the tender offer device in two related ways. First, if time is of the essence, delay increases the possibility that an offer, once made,

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[23] In 1965, Congress rejected a proposed twenty-day prenotification requirement. *See* 111 Cong. Rec. 28257-28259 (1965). In 1967, Congress rejected a five-day prenotification requirement. S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967); *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 72-75, 87-89, 98, 105, 139-40, 151, 163, 245 (1967); *Hearings on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 44-46, 50-54 (1968). In 1970, Congress rejected yet another prenotification proposal. *See Hearings on H.R. 4285, S. 3431 and S. 336 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 6-7 (1970).

A prenotification requirement is less defensible than required delays *after* a tender offer has been made, because implementation of a successful defensive strategy by management before an offer becomes effective, *e.g.*, the arrangement of a defensive merger, might entirely deprive stockholders of the chance to sell their shares at a premium. *See infra*. *See also Tender Offer Statutes Reconsidered, supra* n.16, at 531-32. Moreover, a number of commentators have identified prenotification provisions as particularly detrimental to successful takeovers. *See, e.g.*, Langevoort, *supra* n.5, at 226-29.

will not be successfully completed. This is because delay eliminates the element of surprise, and affords incumbent management, whose jobs are likely to be imperiled, an opportunity to resort to a variety of defensive maneuvers to thwart the attempted takeover.[24] Second, the specter of delay may serve to dissuade potential offerors from initiating offers at all. *See Kidwell, supra* at 1278 (and sources cited therein).

Both of these propositions regarding delay have been the subject of lively debate in the literature. Delay has been said to benefit rather than injure investors, primarily by permitting the emergence of competitive suitors (and arbitrageurs), thereby creating an "auction market" in which the target's stockholders will ultimately receive a higher premium for their shares. *Tender Offer Statutes Reconsidered, supra* n.20, at 524. *See also A Response to Great Western, supra* n.20, at 901-02, 913. Arguably, stockholders may also benefit from the opportunity to weigh for an extended period an offer as to which there might otherwise be a requirement to promptly tender their shares. *Tender Offer Statutes Reconsidered, supra* n.16, at 524. Moreover, as an empirical matter, despite the proliferation of state takeover statutes, there is no clear indication that those endeavoring to obtain corporate control have curtailed their use of the tender offer mechanism. *See AMCA International Corp.* v. *Krouse,* 482 F. Supp. 929 (S.D. Ohio 1979); *Tender Offer Statutes Reconsidered, supra* n.16, at 523; *A Response to Great Western, supra* n.20, at 902-03, 913.

As indicated, however, there is no evidence in the record about what the actual effect of the potential for delay, inherent in the Illinois Act, has been. In the absence of such evidence, we ought not to second-guess Congress' judgment that delay

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[24] Frequently employed defensive tactics include, *e.g.*, arranging a defensive merger, exhorting shareholders not to tender their shares, increasing dividends and abolishing cumulative voting. *See generally,* Schmults & Kelly, *Cash Take-over Bids—Defensive Tactics,* 23 Bus. Law. 115 (1967); Note, *Defensive Tactics Employed by Incumbent Managements in Contesting Tender Offers,* 21 Stan. L. Rev. 1104 (1969).

grossly in excess of that contemplated by the Williams Act redounds to the detriment of stockholders by substantially deterring the making of tender offers. As the Fifth Circuit noted in *Kidwell*, that assessment was reaffirmed by Congress during consideration of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (1976).

The House Report stated

> it is clear that this short waiting period [referring to the 10 days required by the Williams Act] was founded on congressional concern that a longer delay might unduly favor the target firm's management and permit them to frustrate many pro-competitive cash tenders. This 10-day waiting period, thus underscored the basic purpose of the Williams Act—to maintain a neutral policy toward cash tender offers, by avoiding lengthy delay that might discourage their chances for success.

H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976); U.S. CODE CONG. & ADMIN. NEWS 1976, pp. 2572, 2644. Congressman Rodino explained to the House:

> Lengthy delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a State with an antitakeover statute, or negotiating costly lifetime employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tender offers give to them.... *Generally, the courts have construed the Williams Act so as to maintain these two options for the target company's shareholders, and the House conferees contemplate that the courts will continue to do so.*

122 Cong. Rec. 30877 (1976) (emphasis added [by the Fifth Circuit]).

Kidwell, Supra at 1277-78.

We therefore conclude, purely in light of the congressional judgment and analysis, that tender offers may not be unduly hindered (by grossly extended delay under state law) to the detriment of investors. We reiterate that we possess no independent insight, based on evidence or research, about what the effect of slight or interminable delay may be. But we think the perspectives informing congressional legislation are reasonably clear and are binding upon us. Therefore, we conclude that the Illinois Act is preempted by the Williams Act because the former (1) tends inordinately to substitute regulatory control for investor autonomy, (2) provides for hearings the institution of which may be indirectly delegated to incumbent management and which are potentially interminable in length, (3) provides for other delays and mechanisms for delay which are potentially grossly in excess of the delay mandated by Congress and deemed by Congress to be appropriate to the protection of investors and (4) provides for lenghtly pre-notification delay, a requirement Congress specifically rejected.[25]

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[25] The Illinois Act also differs from the Williams Act in certain other particulars. The Illinois Act requires somewhat more extensive disclosure by an offeror than does the Williams Act, and the Illinois Act requires that acceptances of a partial offer be pro rated for the entire period of the offer, whereas the Williams Act requires proration only of those acceptances made during an offer's initial ten days, although that ten day period may be extended by the offeror. *Cf.* Ill. Rev. Stat. ch. 121½, §§ 137.54 and 137.59.D (1976) with 15 U.S.C. § 78n(d) (1976) and 17 C.F.R. § 240.14d-8 (1979). (The Illinois Act also grants to stockholders a longer period to withdraw their tenders than originally provided for in the Williams Act (17 calendar days v. 7 days), *cf.* Ill. Rev. Stat. ch. 121½, § 137.59.C (1979) with 15 U.S.C. § 78n(d)(5) (1976), but this requirement does not differ markedly from the 15 business day requirement contained in the new SEC tender offer rules, 17 C.F.R. § 240.14d-7 (1979), discussed below. Similarly, the Illinois Act's 20 calendar day minimum offering period, Ill. Rev. Stat. ch. 121½, § 137.59.B (1979), is almost identical to the 20 business day period prescribed by the SEC. 17 C.F.R. § 240.14e-1 (1979)). Aside from the extent to which these differing

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requirements of the Illinois Act may exhibit the constitutional infirmities discussed *supra*, we express no opinion as to whether the Williams Act preempts them.

We also take note that, on December 6, 1979, the SEC promulgated new rules governing tender offers. 17 C.F.R. § 240-14d-1 *et seq.* (1979). Those rules, most glaringly Rule 14d-2(b), directly conflict with the Illinois Act. As the SEC observed:

> Under Rule 14d-2(b) a bidder's public announcement through a press release, newspaper advertisement or public statement of certain material terms of a cash tender offer causes the bidder's tender offer to commence under Section 14(d) of the [1934] Act....
>
> Some commentators noted that there is a direct conflict between Rule 14d-2(b) and state anti-takover statutes with the effect that such statutes are preempted. These statutes typically require a publication of or a public filing which includes the material terms of the tender offer prior to the time the offer may be commenced [The Illinois Act requires a public filing at least 20 days prior to the time an offer may begin. *See* n.17, *supra.*] These requirements of the state statutes will trigger the commencement of the tender offer under Rule 14d-2(b) despite the fact that the state statutes do not permit the offer to commence until the conclusion of any applicable waiting period and hearing process. Moreover, by deeming commencement to occur on the date of the publication or filing required by these statutes, the minimum periods, best price, and withdrawal and pro rata rights provided under these statutes could not function since they are usually predicated on the effective date of the tender offer which cannot occur until after the conclusion of the waiting period and hearing process.
>
> Thus, the conflict between Rule 14d-2(b) and such state statutes is so direct and substantial as to make it impossible to comply with both sets of requirements as they presently exist. While recognizing its long and beneficial partnership with the states in the regulation of securities transactions, the Commission nevertheless believes that the state takeover statutes presently in effect frustrate the operation and purposes of the Williams Act and that, based upon the abuses in current tender offer practice discussed above, Rule 14d-2(b) is necessary for the protection of investors and to achieve the purposes of the Williams Act (footnotes omitted).

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III. THE COMMERCE CLAUSE

The commerce clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . ." U.S. Const., Art. I, § 8, cl. 3. "Although the Clause thus speaks in terms of powers bestowed upon Congress, the [Supreme] Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." *Lewis* v. *BT Investment Managers, Inc.*, 100 S. Ct. 2009, 2015 (1980). It remains true, however,

> that much state legislation, designed to serve legitimate state interests and applied without discrimination against interstate commerce, does not violate the Commerce Clause even though it affects commerce. . . . "[I]n areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the Court in the absence of congressional guidance is called upon to make 'delicate adjustment of the conflicting state and federal claims,' *H.P. Hood & Sons, Inc.* v. *Du Mond*, [336 U.S. 525, 553 (1949)] (Black, J., dissenting). . . ." *Great A & P Tea Co.* v. *Cottrell*, [424 U.S. 366, 371 (1976)]; see *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977).[26]

Raymond Motor Transportation, Inc. v. *Rice*, 434 U.S. 429, 440 (1978).

(Footnote continued from preceding page)

44 Fed. Reg. 70329-30 (1979).

Our finding of preemption in the instant case, however, does not rely on the new SEC rules, because those rules do not apply to tender offers made prior to their effective date, as is the case with the tender offer here. 44 Fed. Reg. 70326 (1979), *Cf. AMCA International Corp.* v. *Krouse*, 482 F. Supp. 929, 933-34, n.4 (S.D. Ohio 1979).

[26] Congress may, if it chooses, affirmatively authorize state regulation that would otherwise contravene the commerce clause. *See, e.g., Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). In the instant case, defendant Dixon has not argued that Congress has consented to state takeover statutes without regard to their impact upon interstate commerce. *Cf. Kidwell, supra* at 1281-82.

The test to be applied in making the "delicate adjustment" of state and federal claims is set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Accord, Lewis v. *BT Investment Managers, Inc., supra* at 2015-16; *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979); *Raymond Motor Transportation, Inc.* v. *Rice, supra* at 441-42; *Great A & P Tea Co.* v. *Cottrell*, 424 U.S. 366, 371-72 (1976); *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 443 (1960). Also relevant is the Supreme Court's statement in *Hughes* v. *Oklahoma, supra* at 336, that "when considering the purpose of a challenged statute, this Court is not bound by '[t]he name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law. *Lacoste* v. *Louisiana Dept. of Conservation*, 263 U.S. 545, 550 (1924). . . ."

Dixon maintains that the state sought to further two legitimate local interests through enactment of the Illinois Act. First, Illinois assertedly acted to protect resident security holders, primarily by insuring that they possess adequate time and information to review the merits of a tender offer before deciding whether to tender their shares. Protecting resident investors is indisputably a legitimate state objective. Yet, as set forth above, the Williams Act itself protects investors by requiring disclosure, withdrawal rights, pro rata purchases and equal consideration for all shares taken up. Therefore, the benefit of the Illinois Act is limited to the marginal increase in

information, time and other benefits that Illinois shareholders may gain as a result of the Act's operation. But, as we noted in the context of preemption, the potentially prolonged delay required by the Act may, in some circumstances at least, be detrimental to the interests of the shareholders. It has also been argued (with respect to a state's interest in its own investors) that additional disclosures, rather than allowing shareholders to make a more informed decision, may actually serve to confuse them and to obscure relevant information. *See Kidwell, supra* at 1280-81 (and sources cited therein). Thus, the benefits flowing to Illinois shareholders from the Act are, to a significant degree, speculative.

And, of course, the strength of the state's interest varies with the number of shareholders that are Illinois residents. In this case, some 27% of Chicago Rivet's shareholders, holding approximately 43% of Rivet's outstanding shares, were Illinois residents. It is fortuitous that this relatively substantial number lived in Illinois. The Act would have applied even if none of Rivet's shareholders were Illinois residents and all the stock sales had occurred elsewhere, since the Act reaches every tender offer made for any corporation that meets, *inter alia*, two of the following conditions:

> (a) has its principal executive office in [Illinois];
>
> (b) is organized under the laws of [Illinois];
>
> (c) has at least 10% of its stated capital and paid-in surplus represented in [Illinois].

Ill. Rev. Stat. ch. 121½, § 137.52-10 (1979). Thus, the Act grants jurisdiction to the Secretary of State over tender offers that would not affect a single Illinois shareholder.[27]

The second interest Dixon asserts on the state's behalf is an interest in regulating the internal affairs of a corporation incorporated under Illinois law. A tender offer is argued to be

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[27] The Act also applies to tender offers made for corporations for which 10% of the outstanding shares are held by Illinois residents. Ill. Rev. Stat. ch. 121½, § 137.52-10 (1979).

functionally equivalent to a variety of other methods designed to effect changes in corporate control, *e.g.*, proxy contests and mergers, which have traditionally been subject to regulation by the state of incorporation. *See* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W. Res. L. Rev. 722, 741-45 (1970); *A Response to Great Western, supra* n.19, at 931-34.

The contention that sales of securities made pursuant to a tender offer are properly analyzed (as "internal affairs") in terms of their cumulative potential to shift control of a corporation, rather than simply as sales of stock from one investor to another, is another proposition which has been extensively debated in the literature.[28] But assuming *arguendo* that a state has an interest in regulating transfers of control of locally incorporated corporations, defendant has not set forth any specific interest that Illinois has in asserting regulatory authority over the tender offer *in this case*. There is no reason to believe that Illinois' interest in regulating shifts in control, as affected here, is especially weighty. The state has not argued, for example, that MITE was intent on looting Chicago Rivet to the

[28] *Cf., e.g.*, Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W. Res. L. Rev. 722, 741-45 (1970); *A Response to Great Western, supra* n.19, at 931-34 (both arguing that a tender offer is an internal corporate transaction) with Wilner and Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1, 16-17 and Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. Cal. L. Rev. 1133, 1153-55 (1974) (suggesting that a tender offer is merely the aggregate of numerous individual sales of securities). The Fifth Circuit has concluded that a tender offer is not properly classifiable under the internal affairs doctrine. *Kidwell, supra* at 1280, n.53.

detriment of state interests.[29] We also note that, although the instant tender offer was made for an Illinois corporation, the Illinois Act applies, *inter alia*, to tender offers for any corporation of which 10% of the outstanding class of equity securities is held by Illinois residents. Ill. Rev. Stat. ch. 121½, § 137.52-10 (1979). Thus, the Act applies to corporations that are incorporated in another state and have their principal place of business outside of Illinois. Illinois clearly has no interest in regulating the internal affairs of such corporations.

Having generally identified the weight and nature of Illinois' regulatory concerns, we must now examine the burden imposed by the Illinois Act on interstate commerce. The impact of the Act on the sale of securities in interstate commerce is in many respects at least potentially weighty. The Act's most obvious burdens result from its global impact. Once the Act has been invoked, all purchases, or offers to purchase by the offeror, of the target company's stock pursuant to a tender offer may be halted, including transactions to be executed entirely outside the boundaries of Illinois. The Illinois Act thus possesses a significant potential to cause commercial disruption.[30] For example, had the Secretary of State not been

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[29] Since Chicago Rivet is an Illinois corporation, the instant case does not directly raise the question whether a state not the state of incorporation has a valid interest in transfers of control (through tender offers for stock). The Illinois Act, for example, seems to be based on the assumption that the state has a recognizable interest in transfers of control if substantial assets and/or the corporation's principal place of business is located in Illinois. *See generally* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W. Res. L. Rev. 722, 751-55 (1970); *A Response to Great Western*, *supra* n.20 at 934-39.

As a practical matter, the state wherein employees or operations are located may have a greater interest in transfer of control (presumably under the "internal affairs" doctrine) than the state of incorporation (if these states are not the same). These possibly disparate bases for local regulation of control transfers do, however, threaten to impair the certainty and uniformity of regulation.

[30] *See, e.g.*, Wilner and Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1, 19-21 (1976).

enjoined from going forward in the instant case, over 23 million dollars of interstate commerce would presumably have been affected. Illinois law would have determined when, if ever, purchases of, or offers to purchase, securities would be permitted under a tender offer. Moreover, the disruptive effects of the Illinois Act could be duplicated by other states seeking simultaneously to assert jurisdiction over a tender offer. In the case at bar, Chicago Rivet argued at various times that both the Illinois and Pennsylvania Acts applied to MITE's proposed tender offer. Where a number of states on various bases claim authority over a tender offer, any single state would have effective veto power over the offer even if it received the enthusiastic endorsement of all the other states.[31]

We think that Illinois' tenuous interest in protecting resident shareholders and regulating control transfers cannot constitutionally justify the Illinois Act's burdensome impact on free-flowing commerce. The Illinois Act's primary burden, interference with securities transactions throughout the nation, inheres in the Act itself and seems relatively concrete, whereas the local impact of changes in corporate control, and the actual protection investors may receive through additional disclosure and delay, are often, as in the case before us, quite speculative.

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[31] This criticism is somewhat muted with respect to the Illinois Act because of the Act's comity provision, Ill. Rev. Stat. ch. 121½, § 137.53 (1979), which provides:

> The registration and filing requirements of . . . this Act shall not apply to a take-over offer if the Secretary has determined that another jurisdiction has, or other jurisdictions have, statutes or rules, which are applicable and are being applied and which afford protection to securityholders located in this State substantially equal to that afforded such securityholders by this Act.

State takeover statutes have also been said to burden interstate commerce by preventing the removal of local business out of state. *See Kidwell, supra* at 1282. Dixon denies that the Illinois Act was intended to have such an effect, and MITE has not argued that the Act is so economically protectionist as to be illegal *per se*. *Cf. Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970). There is no evidence in the record as to what the actual effect of the Act in this regard has been.

Indeed, as we noted in the context of preemption, in some instances at least, grossly prolonged delay may redound to the stockholders' detriment. Thus, because it substantially obstructs interstate commerce, without countervailing local benefit, the Illinois Act violates the commerce clause, and is therefore unconstitutional.

IV. CONCLUSION

Try as we may, we have been unable to square the Illinois Act with the Williams Act and with the constitutional prohibition against burdens on interstate commerce. We do not believe that all state legislation in this field, which imposes requirements going beyond the Williams Act, is unconstitutional merely because it is different. But we simply are of the view that state legislation must conform, *inter alia*, to the Congressional premise that too long extended delay may operate to discourage offers. We are of the further view that the Illinois Act burdens interstate commerce in a manner which is substantial, clear and present, and which is not offset by the speculative protection afforded local shareholders or that state's interest in regulating control changes, which have, at least as argued here, only prospective and uncertain impact. It may very well be possible to draft state takeover legislation to supplement (rather than to contradict) the Williams Act and the congressional *premises and purposes which it incorporates.* Although the new SEC tender offer rules may provide crucial constraints, we perceive no inherent reason why the Williams Act may not be validly complemented and investor protection furthered by state legislation. Suffice to say that under the instant circumstances, Illinois had not succeeded in enacting such an unexceptionable statute.

The judgment is therefore

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MITE CORPORATION and MITE HOLDINGS, INC., *Plaintiffs,* *vs.* **ALAN J. DIXON and CHICAGO RIVET & MACHINE CO.,** *Defendants.*	NO. 79 C 200

JUDGMENT ORDER

JOHN POWERS CROWLEY, District Judge

This matter having come before this Court for a hearing on a permanent injunction upon Count I of the Second Amended Complaint, the Parties' Stipulation, the Parties' Stipulation as to Documents, the exhibits admitted into evidence, the memoranda of the parties, and the arguments of the parties, by their respective counsel, in open court and the Court, being duly advised in the premises, finds and concludes:

1. This Court has subject matter jurisdiction over the claims asserted in the Second Amended Complaint and personal jurisdiction over MITE Corporation, MITE Holdings, Inc., Alan J. Dixon and Chicago Rivet & Machine Co.

2. Venue is proper in this district pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa and 28 U.S.C. § 1391(b).

3. Plaintiffs, MITE Corporation and MITE Holdings, Inc., are corporations duly organized and existing under the laws of the State of Delaware.

4. The common stock of Chicago Rivet & Machine Co. is registered with the Securities and Exchange Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 and is traded on the American Stock Exchange, which is a national securities exchange.

5. Chicago Rivet & Machine Co. presently has Eight Hundred Sixty-Six Thousand Two Hundred Sixty-Four (866,264) shares of Common stock issued and outstanding and has Two Thousand One Hundred Eighty-One (2,181) shareholders of record. Five Hundred Eighty-Nine (589) shareholders owning Three Hundred Seventy-Seven Thousand Three Hundred Ninety-Five (377,395) shares of Chicago Rivet & Machine Co.'s common stock have addresses of record in Illinois and One Thousand Five Hundred Ninety-Two (1,592) shareholders owning Four Hundred Eighty-Eight Thousand Eight Hundred Sixty-Nine (488,869) shares have addresses of record outside Illinois.

6. On January 19, 1979 MITE Holdings, Inc. filed a Schedule 14D-1 with the Securities Exchange Commission pursuant to Section 14(d)(1) of the Securities Exchange Act and Rule 14D-1 promulgated thereunder with respect to proposed cash tender offers.

7. Under the Williams Act, a cash tender offer may commence immediately upon filing a Schedule 14D-1. The offer must remain open for at least seven days.

8. On or about January 19, 1979, MITE Holdings, Inc., a wholly-owned subsidiary of MITE Corporation, proposed to make a tender offer to purchase any and all of the outstanding shares of the common stock of Chicago Rivet & Machine Co. at Twenty-Eight Dollars ($28.00)

per share, a premium of more than Four Dollars ($4.00) per share over the market price in the period immediately preceding the announcement of the offer.

9. The proposed tender offer presents a transaction in interstate commerce of more than Twenty-Three Million Dollars ($23,000,000).

10. MITE Holdings, Inc.'s proposed offer to purchase the common stock of Chicago Rivet & Machine Co. was intended to comply with the requirements of the Williams Act and would have been made to all of the shareholders of Chicago Rivet & Machine Co. throughout the United States, not just shareholders residing in Illinois.

11. For purposes of the Illinois Act, Chicago Rivet & Machine Co. is a "target company" because Chicago Rivet & Machine Co. has its principal executive office in Illinois and is organized under the laws of Illinois (Illinois Act § 2.10(2)(a) and (b)). The Illinois Act, therefore, purports to regulate MITE Holdings, Inc.'s proposed tender offer for any and all shares of Chicago Rivet & Machine Co. common stock.

12. On January 22, 1979, Chicago Rivet & Machine Co. filed a Complaint in Equity alleging that MITE Corporation and MITE Holdings, Inc. were in violation of the Pennsylvania Takeover Law. Chicago Rivet & Machine Co. sought an ex parte order from the Court of Common Pleas of Blair County, Pennsylvania to enjoin MITE Corporation and MITE Holdings, Inc. from proceeding with the proposed cash tender offer. The Honorable Eugene J. Ianuzzi granted Chicago Rivet & Machine Co.'s request and enjoined MITE Corporation and MITE Holdings, Inc. from proceeding with their proposed cash tender offer pending a further hearing which the Court set for January 26, 1979.

13. On January 22, 1979, Chicago Rivet & Machine Co. also filed a Complaint before the Pennsylvania Securities Commission alleging that MITE Corporation and

MITE holdings, Inc. were in violation of the Pennsylvania Takeover Law. Chicago Rivet & Machine Co. requested the Pennsylvania Securities Commission to enforce the Pennsylvania Takeover Law against MITE Corporation and MITE Holdings, Inc.

14. On January 23, 1979 MITE Corporation and MITE Holdings, Inc. removed the action filed in the Court of Common Pleas of Blair County, Pennsylvania, to the United States District Court for the Western District of Pennsylvania.

15. On January 24, 1979 MITE Corporation and MITE Holdings, Inc. filed a Complaint in the United States District Court for the Western District of Pennsylvania seeking to have the Pennsylvania Takeover Law declared unconstitutional and seeking to enjoin its application or enforcement by Chicago Rivet & Machine Co. or by the Pennsylvania Securities Commission as applied to the proposed tender offer. On January 26, 1979 this action was consolidated with the removed action already pending in the Western District Court of Pennsylvania.

16. On January 25, 1979 the Western District Court of Pennsylvania entered a status quo order by consent of the parties and continued the matters pending before it until January 30, 1979.

17. On January 31, 1979 the Pennsylvania Securities Commission entered a Final Order determining that the Commission would not seek to invoke or enforce the Pennsylvania Takeover Law against MITE Corporation's or MITE Holdings, Inc.'s proposed cash tender offer.

18. On February 1, 1979 the Western District Court of Pennsylvania denied Chicago Rivet & Machine Co.'s motion to extend the status quo order previously entered by the Court and denied Chicago Rivet & Machine Co.'s motion for a temporary restraining order.

19. On February 1, 1979 Chicago Rivet & Machine Co. filed a Petition for Review with the Commonwealth Court of Pennsylvania. The petition challenged the Pennsylvania Securities Commission's decision not to invoke or enforce the Pennsylvania Takeover Law as applied to MITE Corporation's and MITE Holdings, Inc.'s proposed cash tender offer.

20. On February 1, 1979, Alan J. Dixon executed a Temporary Cease and Desist Order and Notice of Hearing finding that the matter is properly within the jurisdiction of the Secretary of State and that the provisions of Section 4.A of the Illinois Act are about to be violated and ordering MITE Corporation and MITE Holdings, Inc., among other matters, to "cease and desist all further action to make a tender offer to security holders of the Chicago Rivet & Machine Co." Alan J. Dixon notified plaintiffs that he intended to serve this order and notice on plaintiffs on February 5, 1979.

21. On February 2, 1979 Chicago Rivet & Machine Co. gave plaintiffs a letter stating that it would bring suit in the Circuit Court of Cook County, Illinois, seeking a temporary restraining order against MITE Holdings, Inc.'s proposed tender offer because MITE Holdings, Inc. was violating the Illinois Act.

22. On February 2, 1979 this Court entered an order preliminarily enjoining Alan J. Dixon from serving and issuing any cease and desist order or notice of hearing or from otherwise invoking, applying, or enforcing the Illinois Business Take-Over Act or any orders, rules or regulations issued pursuant to it, against MITE Corporation or MITE Holdings, Inc. or any officer, director, agent, employee or financial, business or legal advisor of either plaintiff or those acting on their behalf in connection with plaintiffs' proposed tender offer for the shares of Chicago Rivet & Machine Co. Pursuant to the request of Alan J. Dixon and Chicago Rivet & Machine Co., the Court entered its order

as a preliminary injunction. This Court denied Chicago Rivet & Machine Co.'s request for a stay in order to appeal this Court's decision to the Seventh Circuit Court of Appeals by February 5, 1979. Chicago Rivet & Machine Co. has not appealed to or requested a stay from the Seventh Circuit, although the time within which it may do either has not expired.

23. On February 5, 1979 MITE Holdings, Inc. published in the national edition of the *Wall Street Journal* its offer to purchase any and all of the outstanding shares of Chicago Rivet & Machine Co. at a price of Twenty-Eight Dollars ($28.00) per share.

24. The offer to purchase the common stock of Chicago Rivet & Machine Co. will be made to all its shareholders throughout the United States, not just shareholders residing in Illinois.

25. The Illinois Act clearly interferes with the purposes and objectives of the Williams Act. Provisions requiring advance notice of the tender offer, requirements concerning the duration of the offer and pro rata purchase and withdrawal provisions, among others, of the Illinois Act explicitly conflict with comparable provisions of the Williams Act and constitute obstacles to the accomplishment of objectives of the Williams Act.

26. The Illinois Act contravenes the purpose and spirit of the Williams Act by upsetting the carefully balanced neutrality of the federal provisions and by providing, contrary to the Congressional scheme, substantial advantages to the target corporation to defeat or delay a tender offer and by imposing, likewise contrary to Congressional intent, substantial obstacles to the ability and right of shareholders to accept tender offers which fully comply with federal requirements.

27. The Illinois Act as a whole and in particular provisions conflicts with the Williams Act. These provisions include among others the following:

(a) a required minimum twenty (20) business day waiting period before a tender offer can be commenced (Illinois Act § 4E), a concept explicitly rejected by Congress;

(b) a mandatory indefinite delay of a tender offer if a majority of the target company's "outside" directors or an Illinois shareholder or group of shareholders holding beneficially or of record 10% of the shares of the target request a hearing, which must then be held (Illinois Act § 7), whereas the Williams Act provides for no pre-tender offer hearings;

(c) a mandatory indefinite delay of a tender offer if the Illinois Secretary of State unilaterally orders a hearing because he determines, in his sole judgment, that such delay is necessary for the protection of Illinois shareholders of the target company (Illinois Act § 7.A.), whereas the Williams Act provides for no pre-tender offer hearings;

(d) an indefinite delay of the commencement of an offer in the event a hearing is requested, pending a decision by the Illinois Secretary of State (Illinois Act § 7A, C, D), whereas the Williams Act permits the offer to commence immediately;

(e) a required twenty (20) day period for a tender offer to remain open (Illinois Act § 9B), whereas the Williams Act permits a tender offer to be completed within seven (7) days of announcement (ten (10) days in the case of a partial offer);

(f) withdrawal rights at any time within seventeen (17) days (Illinois Act § 9C), which differs substantially from and is in conflict with the seven (7) day provision under the Williams Act;

(g) denial of effectiveness of a proposed tender offer if, in the sole opinion of the Illinois Secretary of State, (i) the offer is "inequitable," even though

federal law requires the marketplace to decide upon the fairness of the offer, or (ii) the offer fails to provide full and fair disclosure to the offerees under Illinois law (Illinois Act § 7E), even though the offer is in compliance with federal disclosure standards;

(h) proration of acceptances of a partial offer for the entire period of the offer (Illinois Act § 9D), whereas the Williams Act requires proration of only those acceptances made during the initial ten (10) days of the offer;

(i) pre-tender offer disclosures (Illinois Act § 4B), which cause substantial disruptions in national securities markets, a requirement which was explicitly rejected by Congress;

(j) burdensome disclosure of speculative and immaterial information (Illinois Act § 4C), not required to be disclosed under the Williams Act, with the effect of further delaying a tender offer; and

(k) prohibition of tender offers which are not made to shareholders of the target company who are residents of Illinois on the same terms as to shareholders elsewhere (Illinois Act § 9A), the effect of which is that the Illinois Act competes with the Williams Act as a national system of regulation.

28. By impeding plaintiffs' cash tender offer for Chicago Rivet & Macine [*sic.*] Co., the Illinois Act imposes a substantial burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

29. The Illinois Act violates the Securities Exchange Act of 1934, including, but not limited to, Section 28, which preempts state regulation that conflicts with the provisions of the Securities Exchange Act of 1934.

30. The Illinois Act violates the Constitution of the United States because it conflicts with, and stands as an obstacle to the accomplishment of, the objectives of Congress expressed in the Williams Act amendments to the Securities Exchange Act of 1934 and pursuant to the Supremacy Clause contained in Article IV, Clause 2, of the United States Constitution therefore is preempted.

31. The Illinois Act violates the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States because the Illinois Act imposes a substantial, direct and adverse burden on interstate commerce and serves no legitimate local interest adequate to justify the clearly excessive burden on interstate commerce which it imposes.

32. The Illinois Act is null and void on its face and as applied to MITE Corporation's and MITE Holdings, Inc.'s cash tender offer for any and all shares of Chicago Rivet & Machine Co. because the Illinois Act violates the Commerce Clause of the Constitution of the United States and is preempted by the Williams Act provisions of the Securities Exchange Act of 1934.

33. Denial of a permanent injunction against enforcement of the Illinois Act would cause plaintiffs irreparable injury by depriving them of their federal statutory rights, by imposing on them lengthy delays and giving undue advantage to the management of the "target company" by using these delays to frustrate the tender offer.

34. The injury which would be suffered by plaintiffs if the permanent injunction were denied outweighs any possible injury to defendants caused by the issuance of the injunction. The public interest is served by the issuance of the injunction. There is no good cause to deny plaintiffs' request for a permanent injunction at this time.

35. Plaintiffs would have no remedy at law against Chicago Rivet & Machine Co. or Alan J. Dixon for attempting to enforce the Illinois Act.

36. The Court further fully adopts its oral findings of facts and conclusions of law as stated in open court on February 2, 1979 and February 8, 1979 and incorporates them in this order as if fully set forth herein.

IT IS NOW, THEREFORE

ORDERED that the Illinois Take-Over Act (as amended, effective September 8, 1978) is declared to be null and void and of no force and effect because it violates the Commerce Clause of the United States Constitution and is preempted by the Williams Act provisions of the Security Exchange Act of 1934; and it is further

ORDERED that Alan J. Dixon, his successors, agents, servants, and attorneys and all persons in active concert or participation with him be, and they are, permanently enjoined from serving or issuing any cease and desist order or notice of hearing or from otherwise invoking, applying, or enforcing the Illinois Business Take-Over Act or any orders, rules or regulations issued pursuant to it, against plaintiffs or any officer, director, agent, employee or financial, business or legal advisor of either plaintiff or those acting on their behalf in connection with plaintiffs' proposed tender offer for the shares of Chicago Rivet & Machine Co.

John Powers Crowley
United States District Judge

DATED: February 9, 1979.

Opinion by Judge Cudahy

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS[1]

For the Seventh Circuit

Chicago, Illinois 60604

October 17, 1980

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. EDWARD DUMBAULD, Senior District Judge*

MITE CORPORATION and MITE HOLDINGS, INC.,
Plaintiffs-Appellees,

No. 79-1267

vs.

ALAN J. DIXON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 79-C-200
John Powers Crowley, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

* The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, sitting by designation.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

ALAN J. DIXON, *Appellant,* vs. MITE CORPORATION and MITE HOLDINGS, INC., *Appellees.*	NO. 79-1267

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that ALAN J. DIXON, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order, affirming the judgment of the district court that the Illinois Business Take-Over Act (Ill.Rev.Stat., 1979, ch. 121½, § 137.51) is unconstitutional, entered in this action on October 17, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Respectfully submitted,

TYRONE C. FAHNER
Attorney General
State of Illinois.

By: RUSSELL C. GRIMES, JR.

RUSSELL C. GRIMES, JR.
Assistant Attorney General
160 North LaSalle Street
Suite 800
Chicago, Illinois 60601
(793-5635)
Counsel for Appellant.

PROOF OF SERVICE

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

GERI BRESNAHAN, being first duly sworn, on oath deposes and states that she served a copy of the attached Notice of Appeal to the Supreme Court of the United States upon:

MR. JEROLD S. SOLOVY
Jenner & Block
One IBM Plaza
Chicago, Illinois

by depositing same postpaid and addressed as above at the United States Post Office box located at 160 North LaSalle Street, (lobby), Chicago, Illinois 60601, on the 5th day of January, 1981, before the hour of 5:00 p.m. All parties required to be served have been served. Such service is in compliance with Rule 33(c) of the Rules of the Supreme Court of the United States.

GERI BRESNAHAN

SUBSCRIBED AND SWORN to
before me this 5th day
of January, 1981.

NOTARY PUBLIC

ILLINOIS BUSINESS TAKE-OVER ACT

AN ACT to regulate take-over offers involving business firms organized in Illinois or doing business in Illinois and to amend a certain Act in connection therewith. P.A. 80—1421, approved and eff. Sept. 8, 1978.

137.51. Short title

§ 1. Short Title. This Act shall be known as "The Illinois Business Take-Over Act".

137.51-1. Findings and purpose

§ 1.1. Findings and purpose. In recent years numerous companies have been subjected to take-over offers in which equity securities were acquired suddenly by means of tender offers. Many of these tender offers have been made without advance notice and without giving securityholders of the acquired company adequate time to consider the offer and without giving management of the acquired company adequate time to evaluate alternatives so that they might recommend a course of action that would be in the best interests of all securityholders. The purpose of this Act shall be to protect the interests of Illinois securityholders of companies having a close connection with this State without unduly impeding take-over offers, and this Act shall be interpreted so as to strike a balance that does not favor either management of a target company or an offeror.

137.52. Definitions

§ 2. Definitions. As used in this Act, unless the context requires otherwise, the terms defined in Sections 2.01 through 2.10[1] shall have the meanings ascribed to them in those Sections.

[1] Paragraphs 137.52-1 through 137.52-10 of this chapter.

137.52-1. Affiliate defined

§ 2.01. "Affiliate" of, or a person "affiliated" with, a specified person, means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

137.52-2. Control defined

§ 2.02. "Control" (including the terms "controlling", "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

137.52-3. Equity security defined

§ 2.03. "Equity security" means any stock or other security carrying, at the time of the take-over offer, the right to vote for directors or persons performing substantially similar functions. Equity security also includes any security presently convertible or exercisable into an equity security; any warrant, option or right to purchase an equity security; any security carrying any warrant, option or right to purchase an equity security; any limited partnership interest; and any other security which for the protection of investors is deemed an equity security pursuant to rule or order of the Secretary.

137.52-4. Offeree defined

§ 2.04. "Offeree" means a beneficial owner of equity securities which an offeror proposes or offers to acquire or acquires in connection with a take-over offer.

137.52-5. Offeror defined

§ 2.05. "Offeror" means a person who makes or in any way participates in making a take-over offer, and includes all affiliates of that person. The term does not include a financial

institution or dealer loaning funds, or extending credit to any offeror in the ordinary course of its business, or any accountant, attorney, financial institution, dealer, soliciting dealer, newspaper or magazine of general circulation, consultant, or other person, furnishing information, services, or advice to, or performing ministerial or administrative duties for, an offeror and not otherwise participating in the take-over offer.

137.52-6. Person defined

§ 2.06. "Person" means a natural person, corporation, association, partnership, trust, group, syndicate or other entity.

137.52-7. Secretary defined

§ 2.07. "Secretary" means the Secretary of State of Illinois.

137.52-8. Securities Commissioner defined

§ 2.08. "Securities Commissioner" means the administrator appointed by the Secretary to administer the Securities Department.

137.52-9. Take-over offer defined

§ 2.09. "Take-over offer" means the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if after acquisition the offeror would be, directly or indirectly, a beneficial owner of more than 5% of the class of the outstanding equity securities of the target company which is the subject of the take-over offer. The term does not include an offer to acquire or acquisition of any equity security of a target company pursuant to:

(1) An offer effected by or through a dealer in the ordinary course of its business without solicitation of offers to sell that class of equity securities of the target company;

(2) An offer made to owners of a class of equity securities of a target company if the number of record owners of that class of equity securities of the target company does not exceed 100 at the time of the offer;

(3) An offer, if the acquisition by the offeror of such security, together with all other acquisitions by the offeror of equity securities of the same class during the preceding 12 months, would not exceed 2% of that class of outstanding equity securities of the target company;

(4) An offer by an issuer to purchase or otherwise acquire its own securities;

(5) An offer determined by rule or order of the Secretary to be a take-over offer for which regulation under this Act is not necessary for the protection of securityholders of the target company in this State; or

(6) An offer determined by rule or order of the Secretary to be a take-over offer that is not made for the purpose of, and does not have the effect, of changing or influencing the control of a target company.

137.52-10. Target company defined

§ 2.10. "Target company" means a corporation or other issuer of securities (1) of which 10% of the outstanding securities of the class of its equity securities which is the subject of a take-over offer is held of record by securityholders located in this State as determined by post office address as shown on the records of the issuer, or (2) which meets any two of the following conditions:

(a) has its principal executive office in this State;

(b) is organized under the laws of this State;

(c) has at least 10% of its stated capital and paid-in surplus represented in this State.

137.53. Comity

§ 3. Comity. The registration and filing requirements of Sections 4, 5 and 6 of this Act[1] shall not apply to a take-over offer if the Secretary has determined that another jurisdiction has, or other jurisdictions have, statutes or rules, which are applicable and are being applied and which afford protection to securityholders located in this State substantially equal to that afforded such securityholders by this Act.

[1] Paragraphs 137.54, 137.55 and 137.56 of this chapter.

137.54. Registration requirements

§ 4. Registration requirements. A. It is unlawful for any person to make a take-over offer unless the take-over offer is registered under this Act, or is exempted therefrom by rule or order of the Secretary, or unless the provisions of Section 3 or 19[1] apply.

B. Before a take-over offer becomes registered under this Act, the offeror shall file with the Secretary and deliver by certified mail to the target company at its principal office a registration statement containing the information prescribed in subsection C of this Section, and shall, not later than the date of filing of the registration statement, publicly disclose the intent to make a take-over offer and the material terms of the proposed take-over offer.

C. The registration statement shall be filed on forms prescribed by the Secretary, shall be accompanied by a consent by the offeror to service of process, all solicitation materials then required to be filed by this Act and the filing fee specified in this Act, and shall contain the following information and such additional information as the Secretary by rule or order prescribes:

(1) The identity of and material information concerning the offeror, including:

(a) If the offeror is a corporation or other entity but not a natural person, information concerning its organization, including the year and jurisdiction of its

organization, a description of each class of its equity securities and long-term debt, a description of the business done by the offeror and its affiliates and any material changes therein during the past three years, a description of the location and character of the principal properties of the offeror and its affiliates, a description of any material legal or administrative proceedings during the last 5 years in which the offeror or any of its affiliates is or was a party, or any criminal convictions or penalties (other than traffic violations and similar misdeameanors) during the last 5 years, the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three years, and audited financial statements of the offeror and its affiliates for its three most recent annual accounting periods and unaudited interim financial statements for the offeror's most recent period practicable if the date of the audited financial statement precedes the date of filing by more than 90 calendar days.

(b) If the offeror is a natural person, material information concerning the background of that person, including business activities and affiliations during the past three years, a description of any material legal or administrative proceeding during the last 5 years in which that person is or was a party, or any criminal convictions or penalties (other than traffic violations and similar misdeameanors) during the last 5 years, and such financial statements as the Secretary may prescribe by rule or order.

(2) The source and amount of funds or other consideration used or to be used in acquiring the equity securities, including a statement describing any securities which are being offered in exchange for the equity securities of the target company, and if any part of the acquisition price is or will be represented by borrowed funds or other consid-

eration, a description of the transaction and the names of all the parties, all material terms of such borrowing and any plans or arrangements to finance or repay such borrowing.

(3) The purpose or purposes of the take-over offer including a statement of any plans or proposals which relate to or which would result in an extraordinary corporate transaction involving the target company, such as liquidating the target company, selling a material amount of its assets, effecting a merger or consolidation, or making any other material change in its business, corporate structure, management, or personnel.

(4) The number of shares or units of any equity security of the target company of which the offeror or any affiliate of the offeror is the record or beneficial owner or which the offeror or any affiliate of the offeror has a right to acquire or direct the vote of, directly or indirectly.

(5) Information as to any contracts, arrangements, or understandings with any person with respect to any equity security of the target company, including transfers of any equity security, joint ventures, loan or option arrangements, puts and calls, guarantees of loans, guarantees against loss, guarantees of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom those contracts, arrangements or understandings have been entered into.

(6) Information as to any contracts, arrangements or understandings with any person who is an officer, director, or a person holding a similar position, or a record or beneficial owner of equity securities of the target company with respect to the tender of any equity securities of the target company, the purchase by the offeror of any equity securities owned by that person otherwise than pursuant to the take-over offer, the retention of any person in its present position or in any other management position or

with respect to that person giving or withholding a favorable recommendation regarding the take-over offer.

(7) Information as to any material transaction or negotiations regarding any material transaction, during the last 3 years, between the offeror or any affiliate of the offeror and the target company or any affiliate of the target company.

(8) A description of the provisions made or to be made for providing all material information concerning the take-over offer to offerees, including a copy of the proposed take-over offer in the form proposed to be published, sent or given to offerees.

D. The Secretary may accept, in lieu of the registration statement meeting the requirements of subsection C of this Section, a registration statement form or other filing required by a federal or state government agency or approved by an association of state regulatory agencies which the Secretary has determined by rule or order to encompass disclosure requirements substantially equivalent to those contained in subsection C of this Section.

E. A take-over offer shall become registered 20 business days after the date of filing the registration statement or an amendment thereto with the Secretary, unless accelerated by order or delayed by written notification, or unless prior thereto the Secretary calls a hearing with respect to the offer.

[1] Paragraphs 137.53 or 137.69 of this chapter.

137.55. Filing of solicitation materials

§ 5. Filing of solicitation materials. Copies of the initial public disclosure of the intent to make a take-over offer and all advertisements, ciculars, letters or other materials published, sent or given by the offeror or the target company or an affiliate of the target company, soliciting or requesting the acceptance or rejection of the take-over offer, shall be filed with the Secretary and delivered to the target company or offeror at its principal executive office before the time copies of the materials are first published, sent or given to offerees or otherwise used.

137.56. Amendments

§ 6. Amendments. If any material change occurs in any information required to be filed pursuant to this Act prior to the termination of the take-over offer, an amendment shall be filed promptly with the Secretary, who may delay, terminate, condition, suspend or prohibit the reigstration of the take-over offer or who may allow the proposed registration or registration of the take-over offer to be withdrawn if the Secretary, finding the withdrawal consistent with the public interest and the protection of offerees in this State, consents thereto.

137.57. Hearings

§ 7. Hearings. A. The Secretary shall call a hearing if the Secretary deems it necessary for the protection of offerees in this State or if within 15 business days after the date of filing the registration statement a written request for a hearing is submitted to the Secretary, by a majority of the directors of the target company who are not officers or employees of the target company or by a person or persons who are located in this State as determined by post office address as shown on the records of the target company and who hold of record or beneficially, or both, at least 10% of the outstanding shares of any class of equity securities which is the subject of the take-over offer.

B. Any request for a hearing shall be accompanied by the filing fee and a statement of the reasons for the request. If a hearing is called, the take-over shall not become registered until so declared by order of the Secretary.

C. Any hearing called by the Secretary under this Section shall be commenced before the Securities Commissioner or a person designated by the Secretary within 10 business days following the date the hearing request is received by the Secretary, with notice to the offeror and target company, unless the date for the hearing is extended by the Secretary for the convenience of the parties or for the protection of offerees in

this State. The expenses reasonably attributable to any hearing held under this Act shall be charged ratably to the parties exclusive of the Secretary.

D. A determination shall be made by the Secretary in writing within 15 business days after the conclusion of the hearing, unless such time is extended by order of the Secretary as being in the interest of offerees in this State.

E. If the Secretary finds that the take-over offer fails to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, or that the take-over offer is inequitable or would work or tend to work a fraud or deceit upon the offerees, or that the take-over will not be made to all offerees in this State on substantially equal terms, or that the take-over offer would violate this Act, the Secretary shall by order deny the registration of the take-over offer or condition its registration upon certain changes or modifications. If the Secretary finds that the take-over offer provides full and fair disclosure to the offerees of all material information concerning the take-over offer, and that the take-over offer is made to all offerees in this State on substantially equal terms and the Secretary does not find that the offer is inequitable or would work or tend to work a fraud or deceit upon offerees in this State, or would violate this Act, the Secretary shall by order register the take-over offer. Registration of the take-over offer does not constitute approval of the offer by the Secretary.

137.58. Fraudulent and deceptive practices

§ 8. Fraudulent and deceptive practices. It is unlawful for any person to engage in any fraudulent, deceptive or manipulative acts or practices in connection with a take-over offer. Fraudulent, deceptive and manipulative acts or practices include, without limitation, the following:

(1) Solicitation of any offeree for acceptance or rejection of a take-over offer, or acquisition of any equity security of a target company pursuant to a take-over offer, that is not registered or exempt under this Act, except that the target company may communicate with its security-

holders as permitted by the Securities Exchange Act of 1934[1] and the rules thereunder, as amended from time to time, or by rule or order of the Secretary.

(2) Making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

(3) Sale by any officer, director or affiliate of a target company of all or any part of their equity securities at a price higher than that to be paid to other offerees pursuant to the offer, unless the sales are made at the then existing market price.

(4) Acquisition by the offeror, after initial public disclosure of the intent to make a take-over offer and prior to its termination, of equity securities of the target company otherwise than pursuant to the take-over offer.

[1] 15 U.S.C.A. § 78a et seq.

137.59. Limitations on offerors

§ 9. Limitations on offerors. A. No offeror may make a take-over offer in this State to offerees who are domiciled in this State unless the offer is made on substantially equal terms to those made to offerees who are domiciled outside this State.

B. The take-over offer shall remain open for a minimum offering period of 20 calendar days from the time it is first made or from the time its terms are materially changed.

C. An offeror shall provide that any equity securities of a target company deposited or tendered pursuant to a take-over offer may be withdrawn by or on behalf of any offeree at any time during the first 17 calendar days after the time the take-over offer is first made or the time its terms are materially changed and after 60 calendar days from the time the take-over offer is first made.

D. If an offeror makes a take-over offer for less than all the outstanding equity securities of any class, and if the number of securities deposited or tendered pursuant thereto is greater than the number the offeror is bound or willing to accept and pay for, the securities shall be accepted pro rata, disregarding fractions, according to the number of securities deposited or tendered by each offeree.

E. If an offeror varies the terms of a take-over offer before its expiration date by increasing or decreasing the consideration offered to the offerees, the offeror shall pay for all equity securities accepted the highest consideration paid for any of such securities, whether the securities have been accepted by the offeror before or after the variation in the terms of the offer.

F. No offeror shall make a take-over offer at any time when an administrative or injunctive proceeding has been brought by the Secretary against the offeror for violation of this Act or The Illinois Securities Law of 1953, as amended,[1] which proceeding has not been finally determined.

G. No offeror may acquire, remove or exercise control, directly or indirectly, over any assets of a target company located in this State pursuant to a take-over offer unless the offer is registered, exempted or excluded under this Act, except that an offeror shall not be deemed to be precluded from acquiring, removing or exercising control over assets of a target company if such acquisition, removal or exercise of control is not related directly or indirectly to a take-over offer or as otherwise permitted by rule or order of the Secretary.

[1] Paragraph 137.1 et seq. of this chapter.

137.60. Rules and administration

§ 10. Rules and administration. A. This Act shall be administered by the Secretary who may promulgate rules as may be necessary to carry out the provisions of this Act including rules defining fraudulent, deceptive, and manipulative acts and practices, and defining any terms, whether or not used in this Act, insofar as the definitions are not inconsistent

with the provisions of this Act. Among other things, the Secretary shall have authority, for the purposes of this Act, to prescribe the form or forms in which required information shall be set forth, accounting practices, and the items or details to be shown in financial statements. The rules adopted by the Secretary under this Act shall be effective in the manner provided for in "The Illinois Administrative Procedure Act", approved September 22, 1975, as amended.[1] No provisions of this Act imposing any liability or penalty shall apply to any act done or omitted in good faith in conformity with any rule or order of the Secretary under this Act, notwithstanding that such rule or order may, after such act or omission be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

B. Whenever it shall appear to the Secretary, either upon complaint or otherwise, that any provision of this Act, or of any rule or order issued under authority thereof, has been or is about to be violated, the Secretary has the discretion to require or permit such person to file with the Secretary a statement in writing under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which the Secretary believes to be in the public interest to investigate, and may investigate such facts and issue orders and notices, including cease and desist orders and notices.

C. The Secretary by rule or order may require the offeror or the target company to file any additional documents, exhibits and information that is material to the take-over offer and may permit by rule or order the omission of any of the information specified by this Act if the Secretary determines that the information is not required for the protection of the offerees.

D. For the purpose of all investigations which, in the opinion of the Secretary, are necessary and proper for the enforcement of this Act, the Secretary, or a person designated by the Secretary, is empowered to administer oaths and affirmations, subpoena witnesses, take evidence and require the production of any books, papers, or other documents which are deemed relevant or material to the inquiry.

E. The Secretary shall have the discretion to issue interpretive opinions upon receipt of a written request, containing the relevant facts and legal issues, and the filing fee therefor.

F. In no case shall the Secretary, the Securities Commissioner or any person designated by the Secretary, in the administration of this Act, incur any official or personal liability by instituting an injunction or other proceeding or by registering or denying registration to, or conditioning or suspending or terminating the registration of a take-over offer or consenting to the withdrawal of the proposed registration or registration of the take-over offer.

[1] Chapter 127, ¶ 1001 et seq.

137.61. Fees

§ 11. Fees. The filing fee for a registration statement filed pursuant to this Act by an offeror shall be $1,250. The filing fee for a hearing pursuant to this Act shall be $500. The filing fee for an interpretive opinion shall be $250. In no event shall these fees be returnable.

137.62. Injunctions

§ 12. Injunctions. A. In addition to all other remedies, the Secretary through the Office of the Attorney General may bring an action in any court of competent jurisdiction in the name and on behalf of the State of Illinois against any person or persons, who appear to have engaged in, or be about to engage in, an act or practice constituting a violation of this Act, to enjoin those persons from continuing or doing any act in violation of this Act, or to enforce compliance with this Act. In any court proceedings the Secretary may apply for, and on due showing be entitled to have, the court's subpoena requiring the appearance of any defendant and its employees or agents and the production of documents, books and records, as may appear necessary for the hearing of the petition, to testify and give evidence concerning the acts or conduct or things complained of

in the action. The fees of subpoenaed witnesses under this Act for attendance and travel shall be the same as fees of witnesses before the Circuit Courts of this State, such fees to be paid when the witness is excused from further attendance, provided such witness is subpoenaed at the instance of the Secretary; and payment of such fees shall be made and audited in the same manner as other expenses of the Secretary. Whenever a subpoena is issued at the request of a complainant or respondent or defendant as the case may be, the Secretary may require that the cost of service and the fee of the witness shall be borne by the party at whose instance the witness is summoned. The Secretary shall have the discretion to require a deposit to cover the cost of such service and witness fees and the payment of the legal witness fee and mileage to the witness served with subpoena. A subpoena issued under the provisions of this Act shall be served in the same manner as a subpoena issued out of a court of record. Upon a proper showing, the court may grant a temporary restraining order or preliminary injunction or permanent injunction or may order rescission of any sales, tenders for sale, purchases, or tenders for purchase of equity securities determined to be unlawful under this Act or any rule or order of the Secretary.

B. Whenever it shall appear that any person has engaged in or is about to engage in any act or practice constituting a violation of this Act, any offeror, target company, security holder of an offeror or target company, or any other party in interest may bring an action in any court of competent jurisdiction, including any court of competent jurisdiction in the county or district in which the party in interest resides, or where the person has its principal office or registered office or where any part of the transaction has or will take place, to enjoin that person from continuing or doing any act or practice constituting a violation of or to enforce compliance with this Act. Upon a proper showing, the court shall grant a permanent or preliminary injunction or temporary restraining order or rescission of any sales, tenders for sale, purchases, or tenders for purchase of

equity securities determined to be a violation of this Act. A copy of the complaint shall be served upon the Office of the Secretary of State within 24 hours of filing. This may be done by personal service or certified mail.

137.63. Criminal prosecution

§ 13. Criminal prosecution. A. Any person who, in connection with a take-over offer, willfully makes or causes to be made to the Secretary any statement of a material fact which the person knows to be false, or willfully withholds or causes to be withheld from the Secretary any information the disclosure off which such person knows is necessary, in light of the circumstances, to make not misleading other statements of material facts made or caused to be made by such person to the Secretary, commits a Class 4 felony and upon conviction shall be subject to such punishment as provided by law.

B. Any person who, in connection with a take-over offer, willfully publishes or causes to be published any statement of a material fact which the person knows to be false, or willfully omits to publish information which the person knows is necessary, in light of the circumstances, to make not misleading other statements of material facts published or caused to be published by it, commits a Class 4 felony and upon conviction shall be subject to such punishment as provided by law.

C. Any person who willfully violates any provisions of this Act for which a specific criminal penalty is not otherwise provided shall be guilty upon conviction of a Class A misdemeanor, except that the fine therefor shall not exceed $10,000 per offense.

D. Nothing herein shall limit the power of the State to punish any person for conduct which constitutes a crime under any other statute.

E. Each of the acts specified shall constitute a separate offense and a prosecution or conviction for any one of such offenses shall not bar prosecution or conviction for any other offense.

F. Any person who shall be adjudicated guilty of a second or any subsequent offense specified in this Act, commits a Class 4 felony and shall be subject to such punishment as provided by law, except that the fine therefor shall not exceed $25,000 for such second or subsequent offense.

G. The Secretary may refer such evidence as is available concerning violations of this Act or of any rule or order hereunder to the Attorney General.

H. The Attorney General, with such assistance as may from time to time be requested of the State's Attorneys in the several counties, shall investigate suspected criminal violations of this Act and shall commence and try prosecutions under this Act. Prosecutions under this Act may be commenced by information or indictment. With respect to the commencement and trial of such prosecutions, the Attorney General shall have all of the powers and duties vested by law in State's Attorneys with respect to criminal prosectutions generally.

I. All prosecutions under this Act or based upon any provisions of this Act must be commenced within 3 years after the act or transaction constituting the violation upon which such prosecution is based.

137.64. Civil remedies

§ 14. Civil remedies. A. Any person who violates any provision of this Act in connection with a take-over offer or directly, materially and knowingly participates in such a violation shall be jointly and severally liable to any person suffering losses caused by such violation for:

(1) Damages in the amount of such loss (together with interest from the date of such loss); or

(2) Any equitable remedy, including but not limited to rescission, which any court of competent jurisdiction shall determine in its discretion to be just and equitable

under the circumstances. In any such suit the court may, in its discretion, assess reasonable costs, including reasonable attorneys' fees, against any party.

B. Every person who is found liable *for* damages may recover in contribution, as in cases of contract, from other persons who, if joined in the original suit, would have been liable to pay the same damages.

C. A person shall not be liable under this Section 14 if such person proves that such person did not know or, after inquiry, had reasonable gounds not to know of the existence of the facts upon which liability is alleged to exist.

D. The rights and remedies under this Act are in addition to any other rights or remedies that may exist at law or in equity.

137.65. Civil penalties

§ 15. Civil penalties. The Secretary through the Office of the Attorney General may bring an action in the name and on the behalf of the people of this State against any person, or agent of such person, domestic or foreign, to recover a penalty in a sum not to exceed $10,000 per violation for the commission of any act herein deemed illegal.

137.66. Period of limitation

§ Period of limitation. No action shall be maintained to enforce any liability or penalty created under this Act unless brought before the expiration of 3 years after the act or transaction constituting the violation. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act. Every cause of action under this Act survives the death of any person who might have been a plaintiff or defendant.

137.67. Certifications

§ 17. Certifications. In any civil or criminal action brought under this Act, a certificate under the seal of this State, signed by the Secretary, stating the presence or the absence of a filing

pursuant to the provisions of this Act, shall constitute prima facie evidence of a filing or the absence thereof pursuant to this Act and shall be admissible in any such action. Such certificate shall be furnished by the Secretary upon written request therefor and the payment of a certification fee of $2.

137.68. Service of process

§ 18. Service of process. A. A consent to service of process shall be in the form prescribed by the Secretary, shall be irrevocable, and shall provide that actions arising out of or founded upon any alleged violation of this Act may be commenced against the person executing such consent in any court of competent jurisdiction and proper venue within this State, by the service of process upon the Secretary.

Service of any process or pleading in any action against a person who has filed hereunder a consent to service of process upon the Secretary shall, if made on the Secretary, be in duplicate copies, one of which shall be filed in the Office of the Secretary of State and the other immediately forwarded by the Secretary by registered or certified mail to such person at its latest address on file in the Office of the Secretary of State.

B. (1) A take-over offer made to offerees in this State, whether effected by mail or otherwise, by any person (unless such offer is exempted or excluded) shall be equivalent to and shall constitute an appointment by such person of the Secretary, or successors in office, to be the true and lawful attorney for such person upon whom may be served all lawful process in any action or proceeding against such person, arising out of the take-over offer.

(2) Service of process under this subsection B shall be made by serving a copy upon the Secretary or any employee of that Office designated to accept such service, provided notice of such copy of the process is, within 10 calendar days thereafter, sent by certified mail by the plaintiff to the defendant, at the last known address of the defendant, and the plaintiff's affidavit

of compliance, in substantially such form as the Secretary may by rule prescribe, is appended to the summons. The Secretary shall keep a record of all such processes which shall show the date and hour of such service.

137.69. Exclusions from the Act

§ 19. Exclusions from the Act. A. If the target company is an insurance company or an insurance holding company, or a railroad or public utility holding or operating company or person, or any public carrier of passengers or freight, or a state-chartered bank or a national banking association, or a bank holding company with 90% or more of its consolidated assets comprised of assets of its bank subsidiary or subsidiaries, or a savings and loan association, subject to regulation by a federal or state agency and the change of control of such company is subject to approval by that agency, this Act shall not apply.

B. This Act shall not apply to any offer involving a vote by shareholders of the target company, pursuant to its articles of incorporation or the applicable corporation statute, on a merger, consolidation or sale of corporate assets or sale of its securities in exchange for cash or securities of another corporation, or both.

137.70. Application of the Act

§ 30. Application of the Act. A. All of the provisions of The Illinois Securities Law of 1953, as amended,[1] which are not in conflict with this Act shall apply to any take-over offer.

B. This Act shall be liberally construed to effect the purposes thereof.

C. In any proceeding under this Act, the burden of proving an exclusion, exemption or exception shall be upon the party alleging such matter or raising it as a defense.

D. If any provision or provisions of this Act shall be held invalid, the remainder of this Act shall not be affected thereby.

E. This Act shall not apply to any take-over offer that has been made to securityholders of a target company prior to the effective date of this Act unless the offeror elects to make such take-over offer subject to this Act.

[1] Paragraph 137.1 et seq. of this chapter.

15 U.S.C. § 78m(d):

(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having

the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

15 U.S.C. § 78n(d):

(d) (1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g) (2) (G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material

are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is

deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

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No. 80-1188

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES EDGAR,
APPELLANT,

v.

MITE CORPORATION AND MITE HOLDINGS, INC.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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Jurisdictional Statement Filed January 15, 1981.
Probable Jurisdiction Noted May 4, 1981.

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APPENDIX A

DOCKET SHEET

DATE	NR.	ITEM
1/19/79	1	Filed 1/19/79 Complaint and two copies.
1/19/79	2	Filed 1/19/79 Civil Cover Sheet.
1/22/79	3	Filed 1/19/79 (a) Transfer of Case to the Executive Committee for Reassignment. The above-captioned cause is currently pending on my calendar. I recommend to the Executive Committee that this case be reassigned by lot to another judge of this Court. The reasons for my recommendaton are indicated on the reverse of this form. Crowley, J. (This cause was assigned to me pursuant to General Rule 2.21D(1) as being related to Case No. 78 C4246 and 78 C 3676. It does not appear to be related within the meaning of General Rule 2.31. (b) Order of the Executive Committee: It is hereby ordered that the Clerk of the Court reassign the above-captioned cause by lot to the calendar of an individual judge of this Court in accordance with the Rules. Enter: For the Executive Committee. — Parsons, CJ (JUDGE CROWLEY).
1/22/79	4	Filed 1/22/79 Appearance of defendant Chicago Rivet and Machine Co. and that of its attorneys with Affidavit re Rule 39.
1/22/79	5	Filed 1/22/79 Answer to Complaint of defendant, Chicago Rivet and Machine Co.
1/23/79	6	Filed 1/22/79 Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction.

1/23/79	7	Filed 1/22/79 Motion of Defendant Chicago Rivet and Machine Co. to Dismiss Plaintiffs' Complaint.
1/23/79	8	Enter order dated January 22, 1979: Hearing on plaintiffs' motion for temporary restraining order held. Defendant Dixon given leave to adopt motion to dismiss of Chicago Rivet and Machine Co. Hearing on motion for temporary restraining order continued to January 23, 1979 at 9:30 a.m. — Crowley, J.
1/24/79	9	Filed 1/23/79 Plaintiff's Motion for Leave to File First Amended Complaint.
1/24/79	10	Filed 1/23/79 Plaintiff's First Amended Complaint.
1/24/79		Filed 1/23/79 Amended Motion for a Temporary Restraining Order and Preliminary Injunction. (not available)
1/24/79	11	Filed 1/23/79 Defendant's Notice of Motion; Motion of Defendant Chicago Rivet & Machine Co. to Dismiss Plaintiff's First Amended Complaint.
1/24/79	12	Filed 1/23/79 Defendant "Rivet" Answer to First Amended Complaint.
1/24/79		Filed 1/23/79 Motion of Defendant Chicago Rivet and Machine Co. to Dismiss First Amended Complaint. (not available)
1/24/79	13	Enter order dated 1/23/79: Hearing on motion for temporary restraining order held. Agreed oral status quo order entered. Plaintiffs given leave to file First Amended Complaint. Defendant Mite given leave to file answer and motion to dismiss the First Amended Complaint. Memorandum in sup-

		port of motion to dismiss to be filed by January 23, 1979. Response to motion to be filed by January 24, 1979. Defendant Dixon given leave to adopt motion to dismiss and supporting memorandum. Ruling on motion to dismiss set for January 26, 1979 at 10:30 a.m. — Crowley, J.
1/25/79	14	Enter order dated January 24, 1979: Hearing held. Plaintiff's amended motion for temporary restraining order and preliminary injunction and defendants' motion to dismiss the First Amended Complaint are entered and continued generally. (see DRAFT for particulars). Ruling of January 26, 1979 is stricken. — Crowley, J.
2/5/79	15	Filed 2/2/79 Plaintiff's Notice of Motion; Second Amended Motion for a Temporary Restraining Order and Preliminary Injunction.
2/5/79	16	Enter order dated 2/2/79. Hearing on plaintiffs' second amended motion for a temporary restraining order and preliminary injunction held. Enter PRELIMINARY Injunction Order (DRAFT). Defendant Dixon given leave to adopt the answer of Chicago Rivet & Machine Co. to the second amended complaint. Defendants' motion to stay the preliminary Injunction Order is denied. Hearing on permanent injunction set for February 8, 1979 at 9:30 a.m. — Crowley, J.
2/8/79		Filed Motion for a Temporary Restraining Order and Preliminary Injunction.

2/8/79		Filed Motion for Leave to File Second Amended Complaint.
2/8/79	17	Filed Second Amended Complaint with added parties.
2/12/79	18	Filed 2/9/79 Verified Answer of Defendant Chicago Rivet and Machine Co. to Second Amended Complaint.
2/12/79	19	Filed 2/9/79 Answer to Second Amended Complaint by defendants Morrissey, Morrissey, Tonn, Ward, Wade, Jindrich and Hank.
2/12/79	20	Filed 2/9/79 Affidavit of Ralph W. Jindrich.
2/12/79	21	Filed 2/9/79 Affidavit of Kenneth A. Bodenstein.
2/12/79	22	Filed 2/9/79 Affidavit of G. Chris Andersen.
2/12/79	23	Filed 2/9/79 Affidavit of Kenneth L. Altman.
2/12/79	24	Filed 2/9/79 Affidavit of Terry F. Grove.
2/12/79	25	Filed 2/9/79 Affidavit of Richard Cheney.
2/13/79	26	Filed 2/12/79 Appearance of additional counsel for plaintiff Mite Corporation with Affidavits re Rule 39 (4).
2/14/79	27	Filed 2/9/79 Certain Defendants Notice of Motion; Motion to Dismiss
2/14/79	28	Enter order dated 2/9/79; Hearing held. According to the findings of fact and conclusions of law, the motion of plaintiffs Mite Corporation and Mite Holdings, Inc. for a permanent injunction is granted (DRAFT). — Crowley, J.
2/14/79	29	Enter order dated 2/9/79: The plaintiffs' Mite Corporation and Mite Holdings, Inc. motion for a preliminary injunction is denied

		(DRAFT). — Crowley, J. Notices mailed 2/14/79
3/2/79	30	Filed 3/2/79 Defendant, Alan J. Dixon, Secretary of State's Notice of Appeal from the final Judgment Order entered 2/9/79.
3/9/79		Filed 3/9/79 Clerk's File Copy Transcript of Proceedings held before Judge Crowley January 22, 23, 24, and February 2, 8, 9, 1979 filed by official court reporter (6 Volumes). (UNDER SEPARATE CERTIFICATE)

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MITE CORPORATION and
MITE HOLDINGS, INC.,
Plaintiffs,

v. No. 79 C 200

ALAN J. DIXON and
CHICAGO RIVET & MACHINE CO.,
Defendants.

STIPULATION

Plaintiffs, MITE Corporation and MITE Holdings, Inc., and defendant, Alan J. Dixon through their respective counsel, stipulate to the matters stated below. Defendant Chicago Rivet & Machine Co. through its counsel stipulates to all the matters stated below except for the bracketed material.

1. This Court has subject matter jurisdiction over the claims asserted in the First Amended Complaint and personal jurisdiction over MITE Corporation, MITE Holdings, Inc., Alan J. Dixon and Chicago Rivet & Machine Co.

2. Venue is proper in this district pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa and 28 U.S.C. §1391(b).

3. Plaintiffs, MITE Corporation and MITE Holdings, Inc., are corporations duly organized and existing under the laws of the State of Delaware.

4. The common stock of Chicago Rivet & Machine Co. is registered with the Securities and Exchange Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 and is traded on the American Stock Exchange, which is a national securities exchange.

5. Chicago Rivet & Machine Co. presently has Eight Hundred Sixty-Six Thousand Two Hundred Sixty-Four (866,264) shares of common stock issued and outstanding and has Two Thousand One Hundred Eighty-One (2,181) shareholders of record. Five Hundred Eighty-Nine (589) shareholders owning Three Hundred Seventy-Seven Thousand Three Hundred Ninety-Five (377,395) shares of Chicago Rivet & Machine Co.'s common stock have addresses of record in Illinois and One Thousand Five Hundred Ninety-Two (1,592) shareholders owning Four Hundred Eighty-Eight Thousand Eight Hundred Sixty-Nine (488,869) shares have addresses of record outside Illinois.

6. On January 19, 1979 MITE Holdings, Inc. filed a Schedule 14D-1 with the Securities and Exchange Commission pursuant to Section 14(d)(1) of the Securities Exchange Act and Rule 14D-1 promulgated thereunder with respect to proposed cash tender offers.

7. Under the Williams Act, a cash tender offer may commence immediately upon filing a Schedule 14D-1. The offer must remain open for at least seven days.

8. On or about January 19, 1979, MITE Holdings, Inc., a wholly-owned subsidiary of MITE Corporation, proposed to make a tender offer to purchase any and all of the outstanding shares of the common stock of Chicago Rivet & Machine Co. for cash at a price of Twenty-Eight Dollars ($28.00) per share, [a premium of more than Four Dollars ($4.00) per share over the market price in the period immediately preceding the announcement of the offer.]

9. The proposed tender offer represents a transaction in interstate commerce [of more than Twenty-Three Million Dollars ($23,000,000).]

[10. MITE Holdings, Inc.'s proposed offer to purchase the common stock of Chicago Rivet & Machine Co. was intended to comply with the requirements of the Williams Act and would have been made to all of the shareholders of Chicago Rivet & Machine Co. throughout the United States, not just shareholders residing in Illinois.]

11. For purposes of the Illinois Act, Chicago Rivet & Machine Co. is a "target company" because Chicago Rivet & Machine Co. has its principal executive office in Illinois and is organized under the laws of Illinois (Illinois Act §2.10(2)(a) and (b)). The Illinois Act, therefore, purports to regulate MITE Holdings, Inc.'s proposed tender offer for any and all shares of Chicago Rivet & Machine Co. common stock.

12. On February 1, 1979, Alan J. Dixon executed a Temporary Cease and Desist Order and Notice of Hearing finding that the matter is properly within the jurisdiction of the Secretary of State and that the provisions of Section 4.A of the Illinois Act are about to be violated and ordering MITE Corporation and MITE Holdings, Inc., among other matters, to "cease and desist all further action to make a tender-offer to security holders of the Chicago Rivet & Machine Co." On February 1, 1979, Alan J. Dixon notified plaintiffs that he intended to serve this order and notice on plaintiffs on February 5, 1979.

13. On February 2, 1979 Chicago Rivet & Machine Co. gave plaintiffs a letter stating that on February 6, 1979, it would bring suit in the Circuit Court of Cook County, Illinois, seeking a temporary restraining order against MITE Holdings, Inc.'s proposed tender offer because MITE Holdings, Inc. was violating the Illinois Act.

14. On February 2, 1979 this Court entered an order preliminarily enjoining Alan J. Dixon from serving and issuing any cease and desist order or notice of hearing or from otherwise invoking, applying, or enforcing the Illinois Business Take-Over Act or any orders, rules or regulations issued pursuant to it, against MITE Corporation or MITE Holdings, Inc. or any officer, director, agent, employee or financial, business or legal advisor of either plaintiff or those acting on their behalf in connection with plaintiffs' proposed tender offer for the shares of Chicago Rivet & Machine Co. Pursuant to the request of Alan J. Dixon and Chicago Rivet & Machine Co., the Court entered its order as a preliminary injunction. This Court denied Chicago Rivet & Machine Co.'s request for a stay in order to appeal this Court's decision to the Seventh Circuit Court of Appeals by February 5, 1979. Chicago Rivet & Machine Co. has not appealed to or requested a stay from the Seventh Circuit, although the time within which it may do either has not expired.

15. On February 5, 1979 MITE Holdings, Inc. published in the national edition of the *Wall Street Journal* its offer to purchase any and all of the outstanding shares of Chicago Rivet & Machine Co. for cash at price of Twenty-Eight Dollars ($28.00) net per share.

16. The Illinois Act requires advance notice of the tender offer, requires the offer to be open at least twenty (20) calendar days, and requires pro rata purchase and withdrawal provisions.

[17. Plaintiffs have no remedy at law against Chicago Rivet & Machine Co. for attempting to enforce the Illinois Act.]

[18. Plaintiffs have no remedy at law against Alan J. Dixon for attempting to enforce the Illinois Act.]

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APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MITE CORPORATION and
MITE HOLDINGS, INC.,
Plaintiffs,

v. No. 79 C 200

ALAN J. DIXON and
CHICAGO RIVET & MACHINE CO.,
Defendants.

MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65(b), MITE Corporation and MITE Holdings, Inc. (collectively "MITE"), for the reasons set forth in the attached Affidavit of Leo J. Brancato, MITE's Memorandum in Support of Motion for a Temporary Restraining Order and Preliminary Injunction and MITE's Complaint, respectfully move for the entry of a temporary restraining order, and thereafter a preliminary injunction, restraining Alan J. Dixon and CHICAGO RIVET & MACHINE CO. from invoking or enforcing the Illinois Business Take-Over Act, P.A. 80-1421 (as amended, effective September 8, 1978) against MITE.

One of the attorneys for
MITE Corporation and
MITE Holdings, Inc.

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STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

AFFIDAVIT

LEO J. BRANCATO, states on oath as follows:

1. I am the President of MITE Corporation ("MITE") and the President of MITE Holdings, Inc. ("MITE Holdings"). I make this affidavit in support of a motion for an order restraining enforcement of the Illinois Business Take-Over Act against MITE and MITE Holdings which are in the process of commencing a cash tender offer for any and all shares of the common stock of CHICAGO RIVET & MACHINE CO. ("CHICAGO RIVET").

2. MITE and MITE Holdings are Delaware corporations with their principal executive offices at 446 Blake Street, New Haven, Connecticut.

3. MITE Holdings is a wholly-owned subsidiary of MITE whose only present business is to make a tender offer for, and hold shares of, CHICAGO RIVET.

4. The principal business of MITE is the develpment, manufacture and sale of industrial fasteners and other products throughout the United States and abroad. MITE has manufacturing facilities in Connecticut and Indiana and employs approximately 1,000 employees. MITE's sales for the fiscal year ended 1978 were $48,202,940, resulting in net income of $4,107,502.

5. Securities of MITE are registered with the Securities and Exchange Commission ("SEC") pursuant to Section 12(b) of the Securities Exchange Act of 1934 (the "Exchange Act"). MITE's Common Stock and Subordinated Debentures are listed and traded on the American Stock Exchange. MITE is currently subject to the informational requirements of the Exchange Act and files reports and other information with the SEC relating to its business, financial statements and other matters.

6. As of August 31, 1978, MITE had 2,242,787 shares of its Common Stock outstanding. As of May 1, 1978, MITE had approximately 5,960 record holders of its Common Stock.

7. MITE has filed a Schedule 14D-1 with the SEC pursuant to Section 14(d)(1) of the Exchange Act and Rule 14d-1 promulgated thereunder with respect to a proposed cash tender offer by MITE and MITE Holdings for any and all shares of CHICAGO RIVET common stock at a price of net $28 cash to selling CHICAGO RIVET stockholders which is $4.12 above the closing price of CHICAGO RIVET stock on January 18, 1979, the last full day of trading prior to the announcement of the proposed offer. The proposed tender offer complies with the federal legislation regulating interstate tender offers (commonly known as the "Williams Act" amendments to the Exchange Act) and the regulations promulgated thereunder.

8. MITE's and MITE Holdings' tender offer for any and all shares of CHICAGO RIVET common stock will be made in Illinois and throughout the entire United States. To accomplish that end, among other things, MITE and MITE Holdings intend on January 24, 1979, to publish the terms of the offer in *The Wall Street Journal* or some other newspaper of general circulation.

9. MITE and MITE Holdings have adequate financing to consummate their proposed cash tender offer for any and all of the shares of CHICAGO RIVET common stock.

10. If MITE and MITE Holdings confront significant delays in proceeding with their proposed cash tender offer for any and all CHICAGO RIVET common stock, these delays may well force MITE and MITE Holdings to discontinue their plan to purchase any and all the shares of CHICAGO RIVET. As a result, MITE and MITE Holdings would irretrievably lose the opportunity to acquire CHICAGO RIVET, a unique company. MITE and MITE Holdings also would be prevented from injecting approximately $23 million into interstate commerce. In addition, shareholders of CHICAGO RIVET residing throughout the United States, including those residing outside of Illinois, would be deprived of the opportunity to decide whether to tender their shares at a substantial premium over market.

(s) LEO J. BRANCATO

Sworn to before me this
19th day of January, 1979.

(s) Ann Moynihan
Notary Public

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MITE CORPORATION and
MITE HOLDINGS, INC.,
Plaintiffs,

v. No. 79 C 200

ALAN J. DIXON and
CHICAGO RIVET & MACHINE CO.,
Defendants.

AMENDED MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65(b), MITE Corporation and Mite Holdings, Inc. (collectively "MITE"), for the reasons set forth in the Affidavits of Robert Blinken (attached) and Leo J. Brancato, MITE's Memorandum in Support of Motion for a Temporary Restraining Order and Preliminary Injunction; MITE's Supplemental Memorandum and Mite's First Amended Complaint, respectfully move for the entry of a temporary restraining order, and thereafter a preliminary injunction, restraining Alan J. Dixon and CHICAGO RIVET & MACHINE CO. from invoking or enforcing the Illinois Business Take-Over Act, P.A. 80-1421 (as amended, effective September 8, 1978), against MITE and restraining CHICAGO RIVET & MACHINE CO. from invoking or enforcing the Pennsylvania Takeover Disclosure Law against MITE.

(s) Chester T. Kamin
One of the Attorneys for
MITE Corporation and
MITE Holdings, Inc.

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STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

AFFIDAVIT

ROBERT J. BLINKEN, states on oath as follows:

1. I am the Chairman of the Board of Directors and the principal executive officer of MITE Corporation ("MITE") and MITE Holdings, Inc. ("MITE HOLDINGS"). I make

this affidavit in support of a motion for an order restraining Chicago Rivet & Machine Co. ("Rivet") from enforcing or invoking the Pennsylvania "Takeover Disclosure Law" against Mite and MITE Holdings or their officers, directors and financial advisers in connection with the proposed cash offer by MITE Holdings for any and all shares of the common stock of Rivet.

2. I am informed and believe that Rivet has admitted that it is an Illinois corporation which maintains its principal executive offices in Bellwood, Illinois. Notwithstanding these conceded facts Rivet has sought to delay, and thus if possible to frustrate, the ability of the stockholders of Rivet to accept the MITE cash offer at a premium over the prior market price of Rivet stock by asserting the applicability to the proposed offer of the Pennsylvania statute referred to above.

3. In pursuance of this strategy Rivet, I am informed, commenced earlier today suit against MITE, MITE Holdings, their officers and directors, and Wertheim & Co. and Wertheim & Co., Inc., the latter being the proposed dealer-manager of the MITE offer, in the Court of Common Pleas of Blair County, Pennsylvania, Equity No. 3203. I am also informed that by a complaint filed today Rivet has sought to induce the Pennsylvania Securities Commission to initiate administrative and/or judicial enforcement proceedings against the MITE defendants on the basis of threatened violations of the same Pennsylvania statute.

4. I am informed by my counsel that they do not believe that the Pennsylvania statute above referred to is applicable to MITE's proposed offer and that in any event the Pennsylvania statute is unconstitutionally invalid insofar as it purports to apply to the MITE offer, for substantially the same reasons already set forth in the plaintiffs' prior memorandum of law with respect to the Illinois Business Take-over Act.

5. If the requested relief is not granted, MITE, MITE Holdings and the common stockholders of Rivet will suffer substantial delay and consequent irreparable injury:

(a) The loan commitments obtained by MITE involve fees of approximately $1,700 per week, and this expense will not be recoverable.

(b) Rivet's strategy has caused the commencement of a second litigation in Pennsylvania. Moreover, Rivet seeks to proliferate litigation still further by inducing the Pennsylvania Securities Commission to act on its administration complaint. These proceedings impose substantial additional legal expenses on MITE, which will likewise not be recoverable at least in major part.

(c) The needless proliferation of litigation increases the burden on the time and attention of MITE's executive personnel, and thus the expense to MITE.

(d) The object of these duplicative proceedings is obviously delay, and beyond that the evident hope that MITE will abandon the proposed offer. This objective threatens the valuable opportunity which MITE desires to offer to Rivet stockholders to sell their stock at a significant cash premium.

(s) Robert J. Blinken

Sworn to before me this
22nd day of January, 1979.

(s) Diane C. Jetterson
Notary Public

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MITE CORPORATION and
MITE HOLDINGS, INC., individually
and derivatively on behalf of
Chicago Rivet & Machine Co.
Plaintiffs,

v. No. 79 C 200

ALAN J. DIXON, CHICAGO RIVET & MACHINE CO., WALTER W. MORRISSEY, JOHN A. MORRISSEY, JOHN H. TONN, THOMAS P. WARD, PAUL M. WADE, RALPH W. JINDRICH, BERNARD J. HANK, JR., ROGER B. BRANSTETTER, ROBERT K. BROWN, CLARENCE E. DAMHORST, DONALD A. MCCORMICK, WILL H. SHINEFLUG, RICHARD A. KEELER, MARGARET M. O'CONNELL, TIMOTHY A. OLSON, and OLIVER T. MANN,
Defendants.

SECOND AMENDED COMPLAINT

Plaintiffs, MITE Corporation ("MITE") and MITE Holdings, Inc. ("MITE Holdings"), by their attorneys, complain against Alan J. Dixon, Chicago Rivet & Machine Co., Walter W. Morrissey, John A. Morrissey, John H. Tonn, Thomas P. Ward, Paul M. Wade, Ralph W. Jindrich, Bernard J. Hank, Jr., Roger B. Branstetter, Robert K. Brown, Clarence E. Damhorst, Donald A. McCormick, Will H. Shineflug, Richard A. Keeler, Margaret M. O'Connell,

Timothy A. Olson and Oliver T. Mann ("the director-officer defendants") and allege as follows:

1. This is an action among other matters for a declaratory judgment, pursuant to 28 U.S.C. §2201, declaring each of the Illinois Business Take-Over Act, P.A. 80-1421 (as amended, effective September 8, 1978) (the "Illinois Act") and the Pennsylvania Takeover Disclosure Law (effective March 3, 1976) (the "Pennsylvania Law") to be null and void on its face and as applied to the plaintiffs, in connection with a proposed cash tender offer by MITE and MITE Holdings for any and all of the outstanding shares of common stock of CHICAGO RIVET & MACHINE CO. ("Chicago Rivet") because the Illinois Act and the Pennsylvania Law conflict with and thus are preempted by the Securities Exchange Act of 1934, 15 U.S.C. §§78a *et seq.* (the "Exchange Act"); because the Illinois Act and the Pennsylvania Law violate the Supremacy and Commerce Clauses of the Constitution of the United States; and because the Illinois Act and the Pennsylvania Law deny rights protected by and enforceable under 42 U.S.C. §1983.

2. Pursuant to Rule 65 of the Federal Rules of Civil Procedure, plaintiffs request a temporary restraining order, preliminary injunction and permanent injunction enjoining and restraining the defendant Dixon from invoking or enforcing the Illinois Act and enjoining and restraining the defendant Chicago Rivet from invoking or enforcing the Illinois Act or the Pennsylvania Law against the plaintiffs in connection with the aforementioned tender offer. Plaintiffs also seek to restrain defendant Chicago Rivet and the director-officer defendants from completing an offer by Chicago Rivet to purchase at least 350,000 shares of its own common stock.

PARTIES

3. Plaintiff MITE is a corporation organized and existing under the laws of the State of Delaware with its principal executive offices at 446 Blake Street, New Haven, Connecticut.

4. Plaintiff MITE Holdings is a corporation organized and existing under the laws of the State of Delaware, with its principal executive offices at 446 Blake Street, New Haven, Connecticut.

5. Defendant Chicago Rivet is a corporation organized and existing under the laws of the State of Illinois with its principal executive offices at 950 S. Twenty-Fifth Avenue, Bellwood, Illinois.

6. Defendant Alan J. Dixon is the Secretary of State of Illinois. He is charged with the administration and enforcement of the Illinois Act. He maintains an office at 188 West Randolph Street, Chicago, Illinois.

7. Defendants Walter W. Morrissey, John A. Morrissey, John H. Tonn, Thomas P. Ward, Paul M. Wade, Ralph W. Jindrich, and Bernard J. Hank, Jr. are and at all pertinent times have been members of the Board of Directors of Chicago Rivet. The remaining defendant officers are: Roger B. Branstetter, Vice President — Tyrone; Robert K. Brown, Vice President — Employee Relations; Clarence E. Damhorst, Vice President — Administration; Donald A. McCormick, Vice President — Manufacturing; Will H. Shineflug, Vice President — Marketing; Richard A. Keeler, Treasurer; Margaret M. O'Connell, Secretary; Timothy A. Olson, Controller; and Oliver T. Mann, Senior Vice President. The individual defendants who are directors or officers of Chicago Rivet are hereinafter collectively sometimes referred to as the director-officer defendants. The director-officer

defendants, except for Roger Branstetter, who is a resident of Pennsylvania, are residents of Illinois.

8. Defendant Walter W. Morrissey owns 18,558 shares of Chicago Rivet common stock which include 5,824 shares owned individually, 1,002 shares held beneficially, 2,152 shares held as co-trustee of a trust in which he has a beneficial interest, and 9,580 shares held in other trusts of which he is a co-trustee.

9. Defendant John A. Morrissey owns 13,686 shares of Chicago Rivet common stock which include 5,079 shares owned individually, 3,592 shares owned beneficially, 3 shares held as custodian for his son, and 5,012 shares held in six trusts of which he is a co-trustee.

10. Defendant John H. Tonn owns 26,815 shares of Chicago Rivet common stock.

11. Defendant Thomas P. Ward owns 5,245 shares of Chicago Rivet common stock which include 3,795 shares owned by his wife, 1,350 shares owned jointly with his wife, and 100 shares held as custodian for his daughter.

12. Defendant Paul M. Wade owns 3,089 shares of Chicago Rivet common stock which includes 1,400 shares owned by him as trustee under self-declaration of trust in which he is the primary beneficiary, 1,909 shares held in trusts of which he is a co-trustee, and 500 shares owned by a corporation in which he has a controlling interest. Paul M. Wade is a co-trustee of the Chicago Rivet & Machine Co. Employees' Trust which holds 21,600 shares of Chicago Rivet common stock.

13. Defendant Ralph W. Jindrich, the President, owns 200 shares of Chicago Rivet common stock. Ralph W. Jindrich is a co-trustee of the Chicago Rivet & Machine Co. Employees'

Trust which holds 21,600 shares of Chicago Rivet common stock.

14. Defendant Bernard J. Hank, Jr. owns 400 shares of Chicago Rivet common stock which include 200 shares owned by his wife.

15. The individual share ownership of the defendant officers who are not directors is presently unknown to plaintiffs.

JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction of this action pursuant to Section 27 of the Exchange Act, 15 U.S.C. §78aa, pursuant to 28 U.S.C. §§1331, 1332 and 1337, as to Counts I, II and IV additionally pursuant to 42 U.S.C. §1983 as to Counts I and II and as to Count III pursuant 28 U.S.C. §1332 and the principles of pendent jurisdiction. The amount in controversey, exclusive of interest and costs, exceeds the sum of $10,000.

17. Venue in this district is proper pursuant to Section 27 of the Exchange Act, 15 U.S.C. §78aa, and 28 U.S.C. §1391(b), because the defendants reside or do business in this district and the acts and transactions giving rise to this claim occur here.

DESCRIPTION OF MITE AND MITE HOLDINGS

18. The principal business of MITE is the development, manufacture and sale of (i) industrial components, consisting of specialty fasteners and hardware products; and (ii) special products, including precision spindles, time stamps and recorders, perforators, hydraulic control devices and attachments for home sewing machines. These products are manufactured in Connecticut and Indiana by MITE, which

has approximately 1,000 employees. MITE's products are sold throughout the United States and abroad. MITE's sales for the fiscal year ended 1978 amounted to $48,202,940 resulting in net income of $4,107,502.

19. MITE's Common Stock, its Convertible Preferred Stock, Series A, and its 10% Subordinated Sinking Fund Debentures due 1997 are registered with the Securities and Exchange Commission ("SEC") pursuant to Section 12(b) of the Exchange Act. The Common Stock and the Subordinated Debentures are listed and traded on the American Stock Exchange. The Covertible Preferred Stock is traded over-the-counter. MITE is currently subject to the informational requirements of the Exchange Act and files reports and other information with the SEC relating to its business and financial statements.

20. MITE has approximately 2,242,787 shares of its Common Stock outstanding and approximately 5,960 record-holders of its Common Stock located in 47 states and the District of Columbia.

21. MITE Holdings is a wholly-owned subsidiary of MITE whose only present business is to make a tender offer for, and hold shares of, Chicago Rivet.

DESCRIPTION OF CHICAGO RIVET

22. The Principal business of Chicago Rivet consists of (i) the development, manufacture and sale of rivets, automatic rivet-setting machines, and the parts and tooling for such machines and the leasing of such machines to cutomers; and (ii) the development, manufacture and sale of steel wire. These products are manufactured in Illinois, Pennsylvania and Iowa by Chicago Rivet, which has approximately 1,000 employees. Chicago Rivet's products are sold or leased

throughout the United States. In 1977 Chicago Rivet's total revenue amounted to $36,486,255, resulting in net earnings of $2,447,946.

23. Chicago Rivet's Common Stock is registered with the SEC pursuant to Section 12(g) of the Exchange Act and is traded on the American Stock Exchange. Chicago Rivet is currently subject to the informational requirements of the Exchange Act and files reports and other information with the SEC relating to its business, financial statements and other matters. As of September 30, 1978, Chicago Rivet had 866,264 shares of Common Stock outstanding. As of December 31, 1977, Chicago Rivet had approximately 2,259 recordholders of its Common Stock.

THE TENDER OFFER AND ITS OBSTRUCTION BY THE ILLINOIS ACT AND THE PENNSYLVANIA LAW

24. MITE has filed a Schedule 14D-1 with the SEC pursuant to Section 14(d)(1) of the Exchange Act and Rule 14d-1 promulgated thereunder with respect to a proposed cash tender offer by MITE Holdings for any and all shares of Chicago Rivet common stock at a price of $28 cash net to selling Chicago Rivet stockholders ("MITE's proposed tender offer"). MITE's proposed tender offer will comply with the federal legislation regulating interstate tender offers (commonly known as the "Williams Act" amendments, 15 U.S.C. §§78m(d)-(e), 78n(d)-(e), to the Exchange Act) and the regulations promulgated thereunder. Under the Williams Act, a cash tender offer may commence immediately upon filing of a Schedule 14D-1. The offer must remain open for at least seven days. Accordingly, but for the Illinois Act and the Pennsylvania Law, MITE's proposed tender offer could have commenced immediately upon filing the Schedule 14D-1. MITE and MITE Holdings initially intended to commence the offer on January 24, 1979.

THE FEDERAL STATUTE

25. In 1968 Congress enacted the Williams Act amendments to the Exchange Act to regulate tender offers, which involve large interstate securities transactions and purchases of securities of corporations under the regulation of the SEC. 15 U.S.C. §§78m(d)-(e) 78n(d)-(e).

26. In enacting the Williams Act, Congress recognized that tender offers serve beneficial economic functions by, among other things, providing investors an opportunity to sell their shares at advantageous premiums over prevailing market prices.

27. The language of the Williams Act and its legislative history demonstrate the intent of Congress that, when an interstate offer is made for the shares of a public corporation, the success or failure of the offer should be left to the free and informed investment judgment of the shareholders of that corporation.

28. Senator Williams, a sponsor of the bill and Chairman of the Senate Subcommittee on Securities which recommended adoption of the Williams Act, clearly explained Congress' intention not to favor either side in a tender offer:

> "The committee has taken extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. The [Williams Act] is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case." 113 Cong. Reg. 24664 (1967).

29. Accordingly, the Williams Act is designed not to defeat or discourage tender offers but to establish evenhanded

regulation which favors neither the offeror nor incumbment management of the corporation whose securities are being purchased.

30. For the protection of investors, the Williams Act requires that the offeror provide the information which Congress has judged to be material for an intelligent determination to sell their securities for a cash premium or to hold them.

31. The provisions of the Williams Act represent a comprehensive, carefully balanced, Congresstional scheme which regulates the entire field of cash tender offers. No aspect of this type of securities transaction was ignored by Congress, and no part of it was left to state regulation.

COUNT I

INVALIDITY OF THE ILLINOIS ACT

32. Plaintiffs repeat and reallege the contents of paragraphs 1-6 and 9-31, inclusive, of this Second Amended Complaint, as if fully set forth herein.

33. The Illinois Act, as amended, became effective on September 8, 1978. It was intended to regulate and does regulate interstate tender offers.

34. The Illinois Act applies to any "take-over offer" for a "target company" (Illinois Act §2.09). For purposes of the Illinois Act, Chicago Rivet is a "target company" because Chicago Rivet has its principal executive office in Illinois and is organized under the laws of Illinois (Illinois Act §2.10 (2)(a) and (b)). The Illinois Act, therefore, purports to regulate MITE's proposed tender offer for any and all shares of Chicago Rivet common stock.

35. The Illinois Act prevented MITE's proposed tender offer from commencing on January 24, 1979 and for an in-

definite time thereafter. The Illinois Act is invalid for the reasons set forth herein.

36. The Illinois Act violates the Exchange Act, including, but not limited to, Section 28, which preempts state regulation that conflicts with the provisions of the Exchange Act.

37. The Illinois Act violates the Constitution of the United States because it conflicts with, and stands as an obstacle to the accomplishment of, the objectives of Congress expressed in the Williams Act amendments to the Exchange Act and pursuant to the Supremacy Clause contained in Article IV, Clause 2, of the United States Constitution is, therefore, preempted.

38. The Illinois Act violates the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States because the Illinois Act imposes a substantial, direct and adverse burden on interstate commerce and serves no legitimate local interest adequate to justify the clearly excessive burden on interstate commerce which it imposes.

39. The Illinois Act denies rights protected by and enforceable under 42 U.S.C. §1983.

40. The Illinois Act clearly interferes with the purposes and objectives of the Williams Act. Provisions requiring advance notice of a tender offer, requirements concerning the duration of offers, and pro-rata purchase and withdrawal provisions, among others, of the Illinois Act explicitly conflict with comparable provisions of the Williams Act and constitute obstacles to the accomplishment of objective of the federal statute.

41. The Illinois Act contravenes the purpose and spirit of the Williams Act by upsetting the carefully balanced neutrality of the federal provisions and by providing, contrary to the

Congressional scheme, substantial advantages to the target corporation to defeat or delay a tender offer and by imposing, likewise contrary to Congressional intent, substantial obstacles to the ability and right of shareholders to accept tender offers which fully comply with federal requirements.

42. The Illinois Act as a whole and in particular provisions conflicts with the Williams Act. These provisions include among others the following:

(a) a required minimum twenty business day waiting period before a tender offer can be commenced (Illinois Act §4E), a concept explicitly rejected by Congress;

(b) a mandatory indefinite delay of a tender offer if a majority of the target company's "outside" directors or an Illinois shareholder or group of shareholders holding beneficially or of record 10% of the shares of the target company request a hearing, which must then be held (Illinois Act §7), whereas the Williams Act provides for no pre-tender offer hearings;

(c) a mandatory indefinite delay of a tender offer if the Illinois Secretary of State unilaterally orders a hearing because he determines, in his sole judgment, that such delay is necessary for the protection of Illinois shareholders of the target company (Illinois Act §7.A.), whereas the Williams Act provides for no pre-tender offer hearings;

(d) an indefinite delay of the commencement of an offer in the event a hearing is requested, pending a decision by the Illinois Secretary of State (Illinois Act §7A, C, D), whereas the Williams Act permits the offer to commence immediately.

(e) a required twenty day period for a tender offer to remain open (Illinois Act §9B), whereas the Williams Act permits a tender offer to be completed within seven days of announcement (ten days in the case of a partial offer);

(f) withdrawal rights at any time within seventeen days (Illinois Act §9C), which differs substantially from and is in conflict with the seven day provision under the Williams Act;

(g) denial of effectiveness of a proposed tender offer if, in the sole opinion of the Illinois Secretary of State, (i) the offer is "inequitable" even though federal law requires the marketplace to decide upon the fairness of the offer, or (ii) the offer fails to provide full and fair disclosure to the offerees under Illinois law, even though the offer is in compliance with federal disclosure standards (Illinois Act §7E);

(h) proration of acceptances of a partial offer for the entire period of the offer (Illinois Act §9D), whereas the Williams Act requires proration of only those acceptances made during the initial ten days of the offer;

(i) pre-tender offer disclosures (Illinois Act §4B), which cause substantial disruptions in national securities markets, a requirement which was explicitly rejected by Congress;

(j) burdensome disclosure of speculative and immaterial information (Illinois Act §4C), not required to be disclosed under the Williams Act, with the effect of further delaying a tender offer; and

(k) prohibition of tender offers which are not made to shareholders of the target company who are residents of Illinois on the same terms as to shareholders elsewhere (Illinois Act §9A), the effect of which is that the Illinois Act competes with the Williams Act as a national system of regulation.

43. By impeding plaintiffs' $28 cash tender offer for Chicago Rivet, the Illionis Act imposes a substantial burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

IRREPARABLE INJURY TO PLAINTIFFS AND TO SHAREHOLDERS OF MITE AND CHICAGO RIVET

44. Defendant Dixon intends to enforce the Illinois Act against plaintiffs and their representatives. Actual or threatened enforcement of the Illinois Act by the defendants, unless enjoined, will cause immediate, serious, substantial and irreparable injury to MITE and its shareholders, to MITE Holdings, and to the shareholders of Chicago Rivet in the following respects, among others:

(a) If MITE and MITE Holdings elect to forego commercial activity which is protected by the Williams Act and by the United States Constitution in order to avoid the harsh criminal and civil penalties which noncompliance with the Illinois Act would threaten to impose upon them, they will be deprived of their right under the Williams Act to make their tender offer at a premium above the market price to shareholders of Chicago Rivet who reside throughout the United States, causing the following irreparable injury to MITE and MITE Holdings and to shareholders of CHICAGO RIVET, among others:

(i) MITE and MITE Holding will irretrievably lose the opportunity to acquire Chicago Rivet, a unique company;

(ii) MITE and MITE Holding will be prevented from injecting up to approximately $23 million in interstate commerce; and

(iii) Shareholders of Chicago Rivet residing throughout the United States, including those residing outside of Illinois, will forever lose their right to sell their Chicago Rivet shares pursuant to the tender offer at the substantial premium above market which MITE and MITE Holdings intend and wish to offer them.

(b) If MITE and MITE Holdings go forward with their tender offer notwithstanding the threat of enforcement of the Illinois Act, even though they have fully complied with the Williams Act and have made full and fair disclosure of all material facts to Chicago Rivet shareholders, MITE and MITE Holdings will suffer the following irreparable injury, among others:

(i) MITE, MITE Holdings and their representatives will be subject to criminal penalties for failure to comply with the provisions of the Illinois Act;

(ii) MITE, MITE Holdings and their representatives may be subject to arduous, lengthy and expensive administrative proceedings in which they will be unable fully to raise or have adjudicated their claims that the Illinois Act is unconstitutional; and

(iii) MITE, MITE Holdings and their respresentatives will be subject to civil liabilities for their failure to comply with the unconstitutional Illinois Act.

(c) If MITE and MITE Holdings attempt to avoid the harm and irreparable injury set forth above by foregoing their rights under the Williams Act and the United States Constitution and by complying with the onerous and burdensome requirements of the Illinois Act, MITE, MITE Holdings and Chicago Rivet shareholders will nonetheless suffer the following irreparable injury, among others:

(i) MITE and MITE Holdings will be subjected to unnecessary, unreasonable and possibly indefinite delay of their proposed tender offer, necessitating the expenditure of substantial sums of money, none of which could ever be recovered;

(ii) MITE and MITE Holdings will be required to tie up substantial amounts of money for an indefinite period of time, thereby causing them to forego valuable alternative investment opportunities the monetary value of which is incalculable and unrecoverable; and

(iii) The market for securities of MITE and Chicago Rivet traded on national securities exchanges will be substantially affected and disrupted in a manner which cannot be eliminated or repaired.

45. Plaintiffs have no adequate remedy at law. Only through the exercise of this Court's equitable powers to enjoin the operation of the Illinois Act will MITE, its shareholders, MITE Holdings, Chicago Rivet's shareholders and the public be fully protected from immediate and irreparable loss and damages.

COUNT II

INVALIDITY OF THE PENNSYLVANIA LAW

46. Plaintiffs repeat and reallege the contents of paragraphs 1-6 and 16-31 inclusive of this Second Amended Complaint, as if fully set forth herein.

47. The Pennsylvania Law became effect March 3, 1976. it was intended to regulate and does regulate interstate tender offers.

48. The Pennsylvania Act applies to any "takeover offer" for a "target company" (Pennsylvania Law §3). To qualify as a "target company" for purposes of the Pennsylvania Law, a corporation (1) must be organized under the laws of Penn-

sylvania *or* (2) must have its principal place of business *and* substantial assets located in Pennsylvania (Pennsylvania Law §3).

49. On Monday, January 22, 1979, Chicago Rivet brought suit in the Court of Common Pleas of Blair County, Pennsylvania, Civil Division — Equity, No. 3203 seeking to invoke the Pennsylvania Law against MITE, MITE Holdings, their officers and directors, Wertheim & Co., Inc., and Wertheim & Co. in connection with MITE's proposed tender offer.

50. On Monday, January 22, 1979, Judge Eugene J. Ianuzzi of the Court of Common Pleas of Blair County, Pennsylvania issued an *ex parte* order preliminary enjoining MITE, MITE Holdings, their officers and directors, Wertheim & Co., Inc., and Wertheim & Co. from, among other things, acquiring or attempting to acquire any common stock of Chicago Rivet or making any tender offer involving the common stock of Chicago Rivet.

51. On Monday, January 22, 1979, Chicago Rivet filed a Complaint with the Pennsylvania Securities Commission seeking to invoke the Pennsylvania Law against MITE and MITE Holdings and their officers and directors in connection with MITE's proposed tender offer.

52. The Pennsylvania Law, if applicable, would have prevented MITE's proposed tender offer from commencing on January 24, 1979 and for an indefinite time thereafter. The Pennsylvania Act is invalid for the reasons set forth herein.

53. The Pennsylvania Law violates the Exchange Act, including, but not limited to, Section 28 thereof, which preempts state regulation that conflicts with the provisions of the Exchange Act.

54. The Pennsylvania Law violates the Constitution of the United States because it conflicts with, and stands as an obstacle to the accomplishment of, the objectives of Congress expressed in the Williams Act amendments to the Exchange Act and pursuant to the Supremacy Clause contained in Article IV, Clause 2, of the United States Constitution is, therefore, preempted.

55. The Pennsylvania Law violates the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States because the Pennsylvania Law imposes a substantial, direct and adverse burden on interstate commerce and serves no legitimate local interest adequate to justify the clearly excesive burden on interstate commerce which it imposes.

56. The Pennsylvania Law denies rights protected by and enforceable under 42 U.S.C. §1983.

57. The Pennsylvania Law contravenes the purpose and spirit of the Williams Act by upsetting the carefully balanced neutrality of the federal provisions and by providing, contrary to the Congressional scheme, substantial advantages to the target corporation to defeat or delay a tender offer and by imposing, likewise contrary to Congressional intent, substantial obstacles to the ability and right of shareholders to accept tender offers which fully comply with federal requirements, all of which constitute obstacles to the accomplishments of objectives of the federal statute.

58. The Pennsylvania Law as a whole and in particular provisions conflicts with the Williams Act. These provisions include among others the following:

(a) a required minimum twenty day waiting period before a tender offer can be commenced (Pennsylvania Law §4(a)), a concept explicitly rejected by Congress;

(b) indefinite delay of a tender offer by hearings which may be commenced by the Pennsylvania Securities Commission on its own intiative or at the request of a target company (Pennsylvania Law §4(d)), whereas the Williams Act provides for no pre-tender offer hearings;

(c) a mandatory indefinite delay of a tender offer if the Pennsylvania Securities Commission summarily determines that the takeover offer fails to provide full and fair disclosure to offerees of all material information (Pennsylvania Law §4(c)), even though the offer is in full compliance with federal disclosure standards;

(d) burdensome disclosure of speculative and immaterial information (Pennsylvania Law §5) not required to be disclosed under the Williams Act, with the effect of further delaying a tender offer; and

(e) adopting a "fiduciary" approach to other regulation of interstate tender offers in conflict with the "market" approach adopted by Congress, exemplified, for example, by the provision which exempts from coverage of the statute tender offers approved by the incumbent board of directors (Pennsylvania Law §8(a)).

59. By impeding plaintiffs' $28 cash tender offer for Chicago Rivet, the Pennsylvania Law imposes a substantial burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

IRREPARABLE INJURY TO PLAINTIFFS AND TO SHAREHOLDERS OF MITE AND CHICAGO RIVET

60. Defendant Chicago Rivet has invoked and continues to invoke the Pennsylvania Law against plaintiffs and their representatives, causing immediate, serious, substantial and irreparable injury to MITE and its shareholders, to MITE

Holdings, and to the shareholders of Chicago Rivet in the following respects, among others:

(a) If MITE and MITE Holdings elect to forego commercial activity which is protected by the Williams Act and by the United States Constitution in order to avoid the harsh criminal and civil penalties which noncompliance with the Pennsylvania Law would threaten to impose upon them, they will be deprived of their right under the Williams Act to make their tender offer at a premium above the market price to shareholders of Chicago Rivet who reside throughout the United States, causing the following irreparable injury to MITE and MITE Holdings and to shareholders of Chicago Rivet, among others:

(i) MITE and MITE Holdings will irretreivably lose the opportunity to acquire Chicago Rivet, a unique company;

(ii) MITE and MITE Holdings will be prevented from injecting up to approximately $23 million in interstate commerce; and

(iii) Shareholders of Chicago Rivet residing throughout the United States, including those residing outside of Pennsylvania, will forever lose their right to sell their Chicago Rivet shares pursuant to the tender offer at the substantial premium above market which MITE and MITE Holdings intend and wish to offer them.

(b) If MITE and MITE Holdings go forward with their tender offer notwithstanding the threat of enforcement of the Pennsylvania Law, even though they have fully complied with the Williams Act and have made full and fair disclosure of all material facts to Chicago Rivet shareholders, MITE and

MITE Holdings will suffer the following irreparable injury, among others:

(i) MITE, MITE Holdings and their representatives will be subject to criminal penalties for failure to comply with the provisions of the Pennsylvania Act;

(ii) MITE, MITE Holdings and their respresentatives may be subject to arduous, lengthy and expensive administrative proceedings in which they will be unable fully to raise or have adjudicated their claims that the Pennsylvania Law is unconstitutional; and

(iii) MITE, MITE Holdings and their representatives will be subject to civil liabilities for their failure to comply with the unconstitutional Pennsylvania Law.

(c) If MITE and MITE Holdings attempt to avoid the harm and irreparable injury set forth above by foregoing their rights under the Williams Act and the United States Constitution and by complying with the onerous and burdensome requirements of the Pennsylvania Law, MITE, MITE Holdings and Chicago Rivet shareholders will nonetheless suffer the following irreparable injury, among others:

(i) MITE and MITE Holdings will be subjected to unnecessary, unreasonable and possible indefinite delay of their proposed tender offer, necessitating the expenditure of substantial sums of money, none of which could ever be recovered;

(ii) MITE and MITE Holdings will be required to tie up substantial amounts of money for an indefinite period of time, thereby causing them to forego valuable alternative investment opportunities the monetary value of which is incalculable and unrecoverable; and

(iii) The market for securities of MITE and Chicago Rivet traded on national securities exchanges will be substantially affected and disrupted in a manner which cannot be eliminated or repaired.

61. Plaintiffs have no adequate remedy at law. Only through the exercise of this Court's equitable powers to enjoin the operation of the Pennsylvania Law will MITE, its shareholders, MITE Holdings, Chicago Rivet's shareholders and the public be fully protected from immediate and irreparable loss and damages.

COUNT III

BREACH OF FIDUCIARY DUTIES, WASTE AND MISMANAGEMENT

62. This count is brought individually and derivatively by plaintiff MITE on behalf of Chicago Rivet & Machine Co. against the director-officer defendants.

63. Plaintiff realleges paragraph 3 through 5 and 6 through 23. MITE was a shareholder of Chicago Rivet prior to the time of the transactions complained of, and has been such a shareholder continuously to the present. MITE presently owns beneficially 23,800 shares of Chicago Rivet common stock.

64. No demand has been made by MITE upon Chicago Rivet or its board of directors to institute and prosecute an action against the defendants named in this Count III for the acts and transactions herein complained of, for the reason that all the present officers and directors of Chicago Rivet are named as defendants herein and are responsible for the acts, transactions and delinquencies herein complained of. No action could be or would be permitted to be instituted by

Chicago Rivet without the consent of its directors and demand upon them would be entirely useless and futile. Chicago Rivet's board of directors could not and would not diligently prosecute this action, because by doing so the directors would, in effect, be suing themselves.

65. No demand has been made by MITE upon the shareholders of Chicago Rivet to bring this action because to do so would be useless and futile. The transactions complained of herein are illegal, null and void and cannot be ratified by less than the unanimous consent of the stockholders.

66. This is not a collusive action to confer upon a court of the United States jurisdiction of an action which it would not otherwise have.

67. The directors and executive officers of Chicago Rivet collectively own a total of 101,904 shares of Chicago Rivet common stock, including 21,600 shares held by an employees trust of which certain director-officer defendants are trustees. Thus, these directors and officers personally own approximately 80,304 shares or approximately 9.3% of all outstanding CHICAGO RIVET shares.

68. On February 5, 1979, defendant Chicago Rivet made an offer to purchase up to at least 350,000 shares of its own common stock for cash at $30 net per share (the "Chicago Rivet offer"). The offer will expire at 4:00 p.m. C.S.T. February 14, 1979, 15 hours prior to the expiration of the MITE offer. These shares will be placed in the treasury and will cease to be outstanding. The Chicago Rivet offer is attached as Exhibit 1 to this Second Amended Complaint.

69. The Chicago Rivet offer states that holders of 285,000 Chicago Rivet shares including all of Chicago Rivet directors

and officers have stated that they do not intend to tender their shares either to Chicago Rivet or to MITE Holdings. 285,000 shares is 32.8% of all outstanding Chicago Rivet shares. The holders of these shares other than the directors and officers are not identified in the Chicago Rivet offer and their identities are presently unknown to plaintiffs.

70. If the Chicago Rivet offer is consummated, the total of outstanding Chicago Rivet shares will be reduced from 866,264 to 516,264, and the group holding 285,000 shares will own approximately 55% of all outstanding Chicago Rivet shares.

71. The Chicago Rivet offer embodies a plan and conspiracy to reduce the number of outstanding shares of Chicago Rivet common stock so as to confer effective control of Chicago Rivet upon the director-officer defendants who individually own only 9.3% of Chicago Rivet's common stock and other unidentified members of their group.

72. The Chicago Rivet offer states that it will reduce the book value per share of Chicago Rivet stock from $24.06 per share to $19.85 per share.

73. The Chicago Rivet offer states:

> "This offer is being made despite the belief of the Board of Directors that the price is inadequate, because of a desire to permit shareholders who wish to sell their stock to do so at a higher price and without selling to MITE Holdings, Inc." (Ex. 1, cover page)
>
> "To the extent that shares of Stock are purchased pursuant to the Offer, there may be fewer outstanding shares of Stock remaining in the hands of

shareholders willing to tender pursuant to an offer by MITE or another offeror (if any). As a result, the Offer may also have the effect of discouraging MITE or other possible offerors (if any) from making an offer to purchase shares of Stock, whether for greater or for lesser consideration than that offered herein." (Ex. 1, p. 7.)

74. The Chicago Rivet offer falsely states that MITE has indicated that if it acquires control it may change Chicago Rivet's business policies and that MITE has not disclosed changes in business policy which it intends. That offer also contains a statement that MITE has refused to respond to a request for information. This statement in context conveys the false impression that MITE refused to respond to a request for information concerning its intentions concerning changes in Chicago Rivet's business policy or corporate structure when no such request was ever made of MITE by Chicago Rivet.

75. The Chicago Rivet offer is in violation of the director-officer defendants' fiduciary duties and constitutes waste and mismanagement of corporate assets and improper expenditure of corporate funds for, among others, the following reasons:

a. The offer has no valid corporate purpose.

b. The offer reduces book value per share.

c. The offer transfers share control of Chicago Rivet to the director-officer defendants and their group without any personal expenditure by these defendants or their group.

d. The offer threatens to deprive the remaining holders of 221,000 Chicago Rivet shares of the benefits of the MITE offer, which is made for any and all Chicago Rivet shares.

e. Defendant directors and each of them authorized the Chicago Rivet offer despite a conflict of interest which should have prevented them from approving expenditure of corporate funds to transfer share control to them and their group for no consideration.

f. The offer is a stratagem designed to discourage and prevent the MITE offer;

g. The defendant directors recommended against any shareholder tendering his shares pursuant to the Chicago Rivet offer, thereby (i) estopping the directors from claiming a valid purpose for that offer and (ii) confirming its manipulative and illegal intent;

h. The mere announcement of the Chicago Rivet offer was designed to impede, and will, if permitted to continue, have the effect of impeding the consummation of the MITE cash offer at $28 per share, with the purpose of perpetuating the director-officer defendants in control and depriving the other Chicago Rivet shareholders of the benefits of the MITE offer.

76. The director-officer defendants' other activities to resist, delay and defeat MITE's tender offer for no proper purpose as alleged hereinabove also constitute a breach of fiduciary duty, waste and mismanagement of corporate assets and improper expenditure of corporate funds, for which these defendants should account.

77. Chicago Rivet's offer will cause further immediate, serious, substantial and irreparable injury to Chicago Rivet and its shareholders by depriving them of the benefits of the MITE offer. These benefits cannot be measured in damages. There is no adequate remedy at law.

COUNT IV

VIOLATION OF SECTION 14(e) OF THE EXCHANGE ACT

78. This Count IV is brought by plaintiffs MITE Corporation and MITE Holdings, Inc. against all defendants except Dixon.

79. Plaintiffs reallege paragraphs 63 and 67 through 77 of Count III.

80. Chicago Rivet's offer contains untrue statements of material fact and omits to state material facts necessary to make statements made therein, in light of the circumstances in which they were made, not misleading, in violation of Section 14(e) of the Exchange Act, in among others, the following respects:

a. The offer fails to disclose the identity of the holders of 285,000 shares of Chicago Rivet stock other than officers or directors holding 101,904 shares who together with the officers and directors have stated their intention not to tender their shares.

b. The offer fails to state that upon successful completion of the offer, the 285,000 share group will own approximately 55% of Chicago Rivet's stock and will effectively control Chicago Rivet.

c. The offer fails to disclose the plans, purposes, agreements, consideration, or any other matters concerning the intentions of the 285,000 share group.

d. The offer falsely conveys the impression that the directors urge shareholders not to tender to Chicago Rivet while at the same time brokers and dealers nationwide are offered a 30 cent per share solicitation fee.

e. The offer falsely states that MITE failed to disclose its intentions concerning the business plans and corporate structure of Chicago Rivet.

f. The offer fails to state that the information request to which MITE declines to respond had no relation to its intentions concerning Chicago Rivet's business or corporate structure.

81. The Chicago Rivet offer is a fraudulent, deceptive and manipulative practice in connection with the MITE offer and with solicitation against the MITE offer in violation of Section 14(e) of the Exchange Act, in among others the following respects:

a. The offer fraudulently and deceptively conveys the impression that the MITE offer is inadequate.

b. The offer uses corporate funds to establish a bidding contest for Chicago Rivet's shares when in fact there is no other bidder than MITE.

c. The offer, even if it is never consummated, poisons the market for the MITE offer when in fact there is no viable alternative bidder than MITE for Chicago Rivet's stock.

d. The offer uses corporate funds to convey share control to the 285,000 share group while preventing the proper operation of an auction market for Chicago Rivet's stock.

e. The offer's excess shares provision (Ex. 1, p. 5) is an inherently fraudulent inducement to tender because MITE may withdraw its offer after the Chicago Rivet offer is closed and because in any event the 15 hours between the closing of the two offers is insufficient time to complete the tender to MITE.

82. MITE will be seriously, substantially and irreparably injured by the Chicago Rivet offer. MITE has no adequate remedy at law.

WHEREFORE, MITE and MITE Holdings ask the Court to grant the following relief:

A. A judgment declaring the Illinois Act null and void;

B. A judgment declaring the Pennsylvania Law null and void;

C. A temporary restraining order, preliminary injunction and permanent injunction enjoining and restraining the defendants Dixon and Chicago Rivet, their successors in office, agents, servants, employees, and attorneys, and all persons in active concert or participation with them from taking any action whatsoever to invoke, enforce or apply the Illinois Act, or any other provisions of state law incorporated by reference therein, or any orders, rules or regulations issued pursuant thereto, against plaintiffs or those acting on their behalf in connection with the proposed cash tender offer by MITE and MITE Holdings for any and all of the shares of CHICAGO RIVET;

D. A temporary restraining order, preliminary injunction and permanent injunction enjoining and restraining the defendant, Chicago Rivet, its agents, servants, employees, and attorneys, and all persons in active concert or participation with it from taking any action whatsoever to invoke, enforce or apply the Pennsylvania Law or any other provision of state law incorporated by reference therein, or any orders, rules or regulations issued pursuant thereto, or the law of any other state purporting to regulate interstate tender offers against plaintiffs or those acting on their behalf in connection with the proposed cash tender offer by MITE and MITE Holdings for any and all of the shares of CHICAGO RIVET;

E. A temproary restraining order, preliminary injunction and permanent injunction enjoining and restraining the defendants Chicago Rivet, Walter W. Morrissey, John A.

Morrissey, John H. Tonn, Thomas P. Ward, Paul M. Wade, Ralph W. Jindrich, Bernard J. Hank, Jr., Robert B. Branstetter, Robert K. Brown, Clarence E. Damhorst, Donald A. McCormick, Will H. Shineflug, Richard A. Keeler, Margaret M. O'Connell, Timothy A. Olson and Oliver T. Mann, their agents, servants, employees, attorneys, successors and assigns and all persons in active concert or participation with them, from proceeding with Chicago Rivet's cash tender offer for 350,000 shares of Chicago Rivet common stock and directing them to communicate to Chicago Rivet's shareholders the withdrawal of the offer, together with appropriate statements correcting material omissions and misstatements in that offer.

F. An order requiring Walter W. Morrissey, John A. Morrissey, John H. Tonn, Thomas P. Ward, Paul M. Wade, Ralph W. Jindrich, Bernard J. Hank, Jr., Roger B. Branstetter, Robert K. Brown, Clarence E. Damhorst, Donald A. McCormick, Will H. Shineflug, Richard A. Keeler, Margaret M. O'Connell, Timothy A. Olson and Oliver T. Mann, to account to Chicago Rivet for their waste, and mismanagement of corporate assets and improper expenditures of corporate funds.

G. A judgment in favor of MITE and MITE Holdings against Walter W. Morrissey, John A. Morrissey, John H. Tonn, Thomas P. Ward, Paul M. Wade, Ralph W. Jindrich, Bernard J. Hank, Jr., Robert B. Branstetter, Robert K. Brown, Clarence E. Damhorst, Donald A. McCormick, Will H. Shineflug, Richard A. Keeler, Margaret M. O'Connell, Timothy A. Olson and Oliver T. Mann, for damages suffered by plaintiffs as a result of these defendants wrongful conduct as alleged hereinabove.

H. A judgment for the costs of this action, including reasonable attorneys' fees; and

I. Such other and further relief as the Court shall deem just and proper.

(s) Chester T. Kamin
One of the attorneys for plaintiffs MITE Corporation and MITE Holdings, Inc.

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VERIFICATION

Robert J. Blinken states on oath that he is Chairman of the Board and Chief Executive Officer of MITE Corporation and of MITE Holdings, Inc., that he has read the within and foregoing Second Amended Complaint and that the facts

alleged therein are true to the best of his knowledge, information and belief.

(s) Robert J. Blinken

Signed and sworn to before me
his 7th day of February,
1979.

(s) June Mullen
Notary Public

EXHIBIT 1

OFFER TO PURCHASE

350,000 Shares of Its

Common Stock
par value $2.00 per share,

by

CHICAGO RIVET & MACHINE CO.

For Cash at $30.00 Net Per Share

The Offer Will Expire February 12, 1979
at 4:00 p.m., Chicago Time Unless Extended

Any shareholder wishing to accept the Offer should either (a) complete and sign the Letter of Tender and forward it with his stock certificates and any other documents required by the Letter of Tender to the Depositary or (b) request his bank or broker to effect the transaction for him. Holders of shares registered in the name of a broker, dealer, bank or other nominee should contact such broker, dealer, bank or nominee if they desire to tender their shares.

MITE Holdings, Inc., a wholly-owned subsidiary of MITE Corporation, has commenced a tender offer for any and all shares of common stock of the Company for cash at $28.00 net per share. The Board of Directors of the Company has decided not to support MITE'S offer because it has determined that the offer is inadequate. The Board of Directors has

also determined that MITE'S offer is not in the best interests of the Company and its shareholders because MITE has indicated that, if it acquires control of the Company, it may change the Company's business policies and corporate structure. While the Board cannot forecast all changes in business policy and corporate structure which MITE intends because MITE has not disclosed them and has refused to respond to a request for information, MITE has stated that it intends to make one change which the Board believes detrimental and that it may make another change which the Board also believes to be detrimental. MITE'S stated intention, if it acquires a substantial number of shares, is to merge the Company with MITE or an affiliate of MITE solely in exchange for cash or unsecured short-term notes, thereby depriving non-tendering shareholders of their equity interest in the Company. MITE may also reduce the Company's cash dividends to its shareholders. The Board believes such a reduction is not desired by many shareholders and may lower the market price of the Company's stock so that MITE would later be able to acquire the shares of non-tendering shareholders at less than its present offering price.

THE BOARD OF DIRECTORS RECOMMENDS AGAINST ANY SHAREHOLDER TENDERING HIS SHARES PURSUANT TO EITHER MITE'S OFFER OR PURSUANT TO THIS OFFER. The Board of Directors believes that neither offer contains the best terms that can be obtained for common stock of the Company, and is actively seeking higher offers. The Directors have advised the Company that they have been advised that holders (including all Directors and officers of the Company) of approximately 285,000 shares do not intend to tender either to MITE or to the Company. In the Board's judgment, the value of the Company's stock to a person seeking a controlling interest in

the Company is greater than $30.00 per share, and, again in the board's opinion, given sufficient time an offer at such a price would become available. However, there can be no assurance that any such offer in fact will become available. Prior to January 19, 1979, the date of MITE's announcement of its proposed offer for the Company's stock at $28.00 per share, the market price of the Company's common stock was substantially below that figure. See Section 10, "Price Range of the Stock; Dividends". This offer is being made, despite the belief of the Board of Directors that the price is inadequate, because of a desire to permit shareholders who wish to sell their stock to do so a a higher price and without selling to MITE Holdings, Inc.

The Company reserves the right to amend this offer without notice in the event that MITE's offer is amended.

To the Holders of Common Shares,
par value $2.00 per share,
of Chicago Rivet & Machine Co.

Chicago Rivet & Machine Co., an Illinois corporation (the "Company"), the principal executive offices of which are located at 950 South 25th Avenue, Bellwood, Illinois 60104, hereby offers (the "Offer") to purchase 350,000 shares of its Common Stock, par value $2.00 per share (the "Stock"), at $30.00 net per share to the seller in cash, upon the terms and subject to the conditions set forth herein and in the accompanying Letter of Tender. The Offer is being made to all holders of the Stock, including officers, directors and control persons of the Company. Tendering shareholders will not be obliged to pay brokerage commissions, fees or transfer taxes on the purchase by the Company if payment is made directly to the registered holder. See Instruction 4 of the Letter of Tender. While the Offer is outstanding, the Company will not purchase any shares of the Stock except pursuant to the Offer.

Since the January 19, 1979 announcement by MITE Corporation ("MITE") of its intention to make a tender offer for the Stock, through its wholly-owned subsidiary, MITE Holdings, Inc. ("Holdings") at a price of $28.00 net per share, the Stock has traded on the American Stock Exchange at prices ranging from $28⅛ to $29¼ per share. On February 2, 1979, the last day for which information was available before the printing of this Circular, such closing price was $28⅜. The closing price of the Stock on the American Stock Exchange was $22⅜ on January 12, 1979, one week before MITE's announcement. See Section 10, "Price Range of the Stock; Dividends." Shareholders may wish to obtain a more recent price quotation from a broker or a newspaper before acting on the Offer.

MITE has commenced a tender offer for all or any shares of the Stock for cash at $28.00 net per share. The Board of Directors of the Company has determined not to support this offer. Its decision reflects a judgment that the price offered by MITE is too low and that MITE's offer is not in the best interest of the Company and its shareholders. Both the price offered by MITE and the price offered herein are less than the amount which an independent firm of investment and financial analysts recently determined to be the value per share of the Company's stock to a person seeking a controlling interest in the Company. See Section 8, "Purposes and Possible Effects of Offer."

The Offer is not conditioned upon any minimum number of shares of the Stock being tendered, and the Company is obligated to purchase all Stock duly tendered up to 350,000 shares. If more than 350,000 shares of Stock are duly tendered by February 12, 1979, the Company may elect, but shall not be obligated, to purchase all or any of such excess.

The Company has the right to amend this Offer without notice in the event that MITE's offer is amended, and to amend or terminate the Offer in certain other circumstances. See Section 13, "Certain Conditions of Offer."

Shareholders desiring assistance concerning the Offer should contact their broker, dealer, commercial bank or trust company. Questions and requests for additional copies of this Offering Circular and the Letter of Tender may also be directed to the Information Agent at its addresses and telephone numbers listed on the back cover of this Offering Circular.

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No person has been authorized to give any information or to make any representations in connection with the Offer other than those contained herein and in the Letter of Tender, and if given or made, such information or representations must not be relied upon as having been authorized by the Company.

1. *Number of Shares.* The Company will, subject to the conditions set forth herein and in the accompanying Letter of Tender, purchase up to 350,000 shares of the Stock if duly tendered prior to 4:00 p.m., Chicago Time, on February 12, 1979 (such time and date being hereinafter referred to as the "Initial Expiration Date"). On February 5, 1979, there were 866,264 shares of Stock outstanding. The 350,000 shares of the Stock to which the Offer relates represented approximately 40% of the Stock outstanding as of that date.

If more than 350,000 shares of the Stock are duly tendered prior to the Initial Expiration Date, the Company may elect, but shall not be obligated, to purchase all or any of such excess. If the Company purchases less than all shares of the Stock tendered prior to the Initial Expiration Date, it will make such purchases on a pro rata basis according to the number of shares tendered by each shareholder (with appropriate adjustments to avoid purchases of fractional shares), subject to the conditions set forth in Section 5, "Conditional Tender of Shares," except that all shares duly tendered by any holder of record February 5, 1979 of less than 100 shares of the Stock will be purchased if the holder tenders all of the shares held by him of record and beneficially. The Company estimates that there were approximately 730 holders of record on such date of less than 100 shares, and that such holders held, in the aggregate, approximately 23,300 shares of the Stock. If fewer than 350,000 shares of the Stock are duly tendered prior to the Initial Expiration Date, the Company will purchase all shares tendered.

2. *Extension of Offer Period.* The Company reserves the right to extend the period of the Offer at any time and from time to time, but in no event will the Company be obligated to purchase more than 350,000 shares pursuant to the Offer. If the Offer is extended, all shares tendered prior to the Initial Expiration Date will be purchased before any shares tendered during any extended period are purchases. If less than all shares tendered during any extended period are purchased, the shares to be purchased will be selected in the order tendered unless otherwise specified in the notice extending the Offer. The later of the Initial Expiration Date and the latest time and date to which the Offer may be so extended is hereinafter referred to as the "Expiration Date."

3. *Payment of Purchase Price; Source of Funds.* Payment for all shares of the Stock purchased pursuant to the Offer will be made on behalf of the Company by The First National Bank of Chicago (the "Depositary"), as soon as practicable following the Initial Expiration Date. In the event the Company should elect to extend the offer, shares duly tendered after the Initial Expiration Date, if purchased, will be paid for on a daily basis, if practicable. All shares not purchased will be returned without expense to the tendering shareholders. The Company will pay any transfer taxes payable on the transfer to it of shares of the Stock purchased pursuant to the Offer if payment is made directly to the registered holder thereof. See Instruction 4 of the Letter of Tender. The company estimates that the total funds (including expenses and fees) required to purchase the entire amount of shares of the Stock subject to the Offer will be $10,700,000. The Company will obtain up to $4,500,000 of such amount from its general corporate funds and has received a commitment from Continental Illinois National Bank and Trust Company of Chicago (the "Bank") for a loan of up to $10,000,000 (the "Loan"). The Loan would be

unsecured and would initially be in the form of a revolving credit for a period of eighteen months, whereupon it would be converted into an eight-year term loan in the amount of the principal balance then outstanding, payable in 32 equal quarterly installments. Interest would be payable quarterly on the principal balance from time to time outstanding, at an annual rate equal to (i) ½ of 1% plus the Bank's prime rate in effect from time to time, during such periods as the principal balance is less than $7,000,000 and (ii) 1% plus the Bank's prime rate in effect from time to time, during such periods as the principal balance exceeds $7,000,000. The Loan could be prepaid in whole or in part at any time without penalty. During the initial eighteen-month period, the Company would pay a commitment fee at an annual rate of ½ of 1% of the average unused portion, if any, of the $10,000,000 credit. The Company would also be required to pay an annual balance deficiency fee at the Bank's prime rate from time to time on the average amount, if any, by which the Company's demand deposit accounts with the Bank are less than (i) 15% of the total available credit during the initial eighteen-month period of the Loan, and (ii) thereafter 15% of the average daily outstanding principal balance of the term loan.

In connection with the Loan, the Company would also agree to observe certain covenants requiring the Company to maintain minimum levels of cash flow, earnings and tangible net worth. The Company and the Bank have not yet agreed on the specific minimum amounts to be required by those covenants. One effect of these covenants will be to restrict the amounts of the Company's funds which would be available for distribution as dividents to the Company's shareholders. Depending on the specific minimum amounts involved and the Company's net income and cash flow during the period the Loan remains outstanding, the covenants could in some

circumstances require diminution or elimination of some or all of the Company's regular and special dividends. The covenants would remain in effect during such period as any portion of the Loan (including interest) remained unpaid.

The commitment also contains other customary provisions, including a provision requiring the Company to indemnify the Bank.

The Company anticipates that it would repay the Loan from internally generated funds and from other sources, which may include the proceeds of other borrowings, although the Company has no commitments or arrangements in this regard.

4. *Tender of Shares.* Except as hereinafter provided, for a shareholder to tender shares of the Stock pursuant to the Offer, certificates for the shares, together with a properly completed and duly executed Letter of Tender and any other documents required thereby, must be received by the Depositary at one of its addresses set forth below prior to the Expiration Date. Signatures on the Letter of Tender must be guaranteed by a commercial bank or trust company having an office or branch in the United States or by a member of a registered national securities exchange or of the National Association of Securities Dealers, Inc. (an "Eligible Institution"), except in cases where shares are tendered for the account of an Eligible Institution.

Tenders of shares of the Stock may be made without concurrent deposit of certificates if made through an Eligible Institution. In such cases (i) the Letter of Tender, properly completed and duly executed, must be received by the Depositary prior to the Expiration Date and (ii) the Letter of Tender must contain a guarantee executed by an Eligible Institution that all certificates and any other documents required by the Letter of

Tender will be delivered not later than eight American Stock Exchange trading days after receipt by the Depositary of such guarantee. Payment for shares tendered pursuant to a Letter of Tender containing such guarantee of delivery will be made only after receipt by the Company of certificates therefor and any other documents required by the Letter of Tender.

If a shareholder desires to tender shares of the Stock pursuant to the Offer but time will not permit the Letter of Tender and any other documents required thereby to reach the Depositary prior to the Expiration Date, such shares may nonetheless be tendered, provided:

(a) the certificates for all tendered shares (if available), a properly completed and duly executed Letter of Tender and any other required documents have been delivered to an Eligible Institution;

(b) the Depositary has received, prior to the Expiration Date, a telegram or letter from such Eligible Institution setting forth the name of the shareholder, the number of shares tendered, stating whether or not the tender is conditioned on a minimum number of shares being purchased from the shareholder (and if so, setting forth such minimum), stating whether or not the shareholder directs the Depositary to tender over shares which the Company does not purchase to MITE (see Section 6, "Tendering Over of Excess Shares") and stating that the tender is being made thereby and guaranteeing that within eight American Stock Exchange trading days thereafter the certificates for all tendered shares, together with a properly completed and duly executed Letter of Tender and any other documents required thereby will be received by the Depositary; and

(c) the certificates for all tendered shares and a properly completed and duly executed Letter of Tender and any

other documents required thereby are received by the Depositary within eight American Stock Exchange trading days after the date of the Depositary's receipt of the telegram or letter described in clause (b).

Payment for shares tendered pursuant to the procedure described in clauses (a), (b) and (c) above will be made only after receipt by the Depositary of certificates therefor, a properly completed and duly executed Letter of Tender and any other documents required by the Letter of Tender.

All questions as to validity, form, eligibilty (including time of receipt) and acceptance of any tender of shares will be determined by the Company, whose determination shall be final and binding. The Company reserves the right to reject any tenders of shares not in appropriate form. The Company also reserves the right to waive any of the conditions of the Offer or any defect in any tender. The Company and the Depositary shall not be obligated to give notice of any defects or irregularities in tenders and shall not incur any liability for failure to give any such notice.

5. *Conditional Tender of Shares.* Under certain circumstances set forth in Section 1, "Number of Shares," the Company will prorate the number of shares of the Stock purchased pursuant to the Offer according to the number of shares tendered by each shareholder (except in the case of holders of record on February 5, 1979 of less than 100 shares of the Stock who tender all of the shares held by them of record and beneficially). The number of shares which will be accepted from any one shareholder pursuant to the Offer therefore cannot be determined in all cases prior to the Initial Expiration Date. For the reasons described in Section 14, "Federal Income Tax Consequences," the number of shares of the Stock accepted from a particular shareholder might affect such shareholder's decision whether to tender.

A shareholder may tender shares of the Stock subject to the condition that a designated minimum number must be purchased from such shareholder by so indicating such number in the box captioned "Conditional Tender" on the Letter of Tender. If the procedure described in the third paragraph of Section 4, "Tender of Shares" is followed, then such minimum number should also be specified in the letter or telegram sent to the Depositary pursuant to clause (b) of such paragraph. Such minimum number may be all or less than all of the shares tendered. If the effect of accepting tenders on a pro rata basis is to reduce the number of shares of the Stock to be purchased from any shareholder below the minimum number so designated, such tender will automatically be regarded as withdrawn and all shares tendered will be returned as soon as practicable thereafter.

6. *Tendering Over of Excess Shares.* A tendering shareholder may direct that any shares of the Stock tendered by him to the Company pursuant to the Offer which are not purchased by the Company (the "Excess Shares") are to be tendered over by the Depositary, on behalf of the tendering shareholder, to MITE pursuant to MITE's current offer to purchase Stock. The Depositary will issue in its own name one or more certificates representing all of the Excess Shares of the tendering shareholders which are to be tendered over, will tender over such certificate or certificates to MITE, and upon purchase of such Excess Shares by MITE will forward the proceeds thereof to the respective tendering shareholders. Neither the Company nor the Depositary (1) will have any obligation with respect to the tender over to MITE beyond the making of the tender and the forwarding of all proceeds received therefrom to the respective tendering shareholders, or (2) will guarantee the acceptance of such Excess Shares by MITE nor the payment for such Excess Shares by MITE. In the event of prior

withdrawal of MITE's offer, such Excess Shares will be returned to the respective tendering shareholders as soon as practicable.

A shareholder may direct that the Depositary tender over his Excess Shares to MITE, as described above, by placing an "X" in the box captioned "Tender Over of Excess Shares to MITE" on the Letter of Tender. If the procedure described in the third paragraph of Section 4, "Tender of Shares" is followed, then such direction to tender over Excess Shares should also be indicated in the letter or telegram sent to the Depositary pursuant to clause (b) of such paragraph.

7. *Withdrawal Rights.* Tenders made pursuant to the Offer will be irrevocable, except that (i) any shares of the Stock tendered may be withdrawn prior to 4:00 p.m., Chicago Time, on February 12, 1979, and (ii) shareholders may in any event withdraw tendered shares at any time after 4:00 p.m., Chicago Time, on April 6, 1979, if for any reason such shares have not been previously purchased or returned by the Company. To be effective, a written or telegraphic notice of withdrawal must be timely recieved by the Depositary at one of its addresses specified below. Any notice of withdrawal must specify the name of the tendering shareholder, the name of the registered holder if different from that of the tendering shareholder, the number of shares of the Stock to be withdrawn and, if available,the serial numbers of the particular certificates evidencing the shares to be withdrawn. All questions as to the validity, including time of receipt, of notices of withdrawal will be determined by the Company, whose determination shall be final and binding.

8. *Purposes and Possible Effects of Offer.* As described in Section 16, "Recent Developments and Litigation," MITE announced on January 19, 1979, that it proposed to make an of-

fer, through its wholly-owned subsidiary, Holdings, to purchase all or any outstanding shares of Stock for cash at $28.00 per share. MITE commenced its offer on February 5, 1979.

The Board of Directors of the Company has determined, without a dissenting vote, that it will not support MITE's offer. The Board's decision reflects a judgment that $28.00 per share is too low a price. The Board of Directors has also determined that MITE's offer is not in the best interests of the Company and its shareholders because MITE has indicated that, if it acquires control of the Company, it may change the Company's business policies and corporate structure. While the Board cannot forecast all changes in business policy and corporate structure which MITE intends because MITE has not disclosed them and has refused to respond to a request for information, MITE has stated that it intends to make one change which the Board believes detrimental and that it may make another change which the Board also believes to be detrimental. MITE's stated intention, if it acquires a substantial number of shares, is to merge the Company with MITE or an affiliate of MITE solely in exchange for cash or unsecured short-term notes, thereby depriving non-tendering shareholders of their equity interest in the Company, MITE may also reduce the Company's cash dividends to its shareholders. The Board believes such a reduction is not desired by many shareholders and may lower the market price of the Company's stock so that MITE would later be able to acquire the shares of non-tendering shareholders at less than its present offering price.

The value of the Company's Stock to a person seeking a controlling interest in the Company was recently determined to be approximately $33.50 to $35.25 per share by Duff and Phelps, Inc., 55 East Monroe Street, Chicago, Illinois, independent investment and financial analysts, in a study com-

missioned by the Company in December, 1978. The study utilized a variety of analytical techniques, using current and historical business and financial information about the Company and other comparable industrial firms.

For the above-stated reasons, the Board does not recommend that shareholders of the Company tender any shares of stock either to MITE or to the Company pursuant to this Offer. The Board does not represent that the Offer is adequate, and does not recommend that any shareholders tender their shares of Stock pursuant to it. The executive officers and directors of the Company and its subsidiaries have advised the Company that they have no present intention to tender any shares of Stock either pursuant to the Offer or pursuant to the MITE offer. The directors have also advised the Company that they have been advised that holders (including all directors and officers of the Company) of approximately 285,000 shares do not intend to tender either to MITE or to the Company. The Board does not believe that either the Offer or the MITE offer represents the highest price per share that could be obtained in any offer to purchase Stock, and is actively seeking higher offers. In the Board's judgment, the value of the Company's stock to a person seeking a controlling interest in the Company is greater than $30.00 per share, and, again in the Board's opinion, given sufficient time an offer at such a price would become available. However, there can be no assurance that any such offer in fact will become available. Prior to January 19, 1979, the date of MITE's announcement of its proposed offer for the Company's stock at $28.00 per share, the market price of the Company's common stock was substantially below that figure. See Section 10, "Price Range of the Stock; Dividends". The Offer is being made despite the belief of the Board of Directors that the price is inadequate, because of a desire to permit shareholders who wish to sell

their stock to do so at a higher price and without selling to MITE Holdings, Inc.

In the event that 350,000 shares of Stock are purchased by the Company pursuant to the Offer, the percentage of the total number of outstanding shares of Stock represented by all of the shares held of record or beneficially by the executive officers and directors of the Company and its subsidiaries (including shares held by the Chicago Rivet & Machine Co. Employees' Trust) will increase from approximately 11.8% to approximately 19.7%, thereby increasing the aggregate voting power which could be exercised by such executive officers and directors relative to the holders of the remaining shares of outstanding Stock. Those executive officers and directors have advised the Company that they have no present intention to purchase any additional shares of Stock. (See Section 12, "Participation of Officers and Directors.")

In the event that more than 350,000 shares of the Stock are tendered pursuant to the Offer prior to the Initial Expiration Date, the Company may purchase less than the total number of shares tendered (but not less than 350,000), and in such event will accept the shares tendered by each shareholder pro rata according to the number of shares tendered by him (except for holders of less than 100 shares who tender all of their shares of Stock held of record or beneficially, all of which will be purchased.) See Section 1, "Number of Shares." In the event of proration, tendering shareholders (other than such holders of less than 100 shares and shareholders who elect to have their excess shares tendered to MITE under the procedure described in Section 6, "Tendering Over of Excess Shares") will remain the owner of some shares of Stock. In such event, there may be adverse tax consequences for some or all of such tendering shareholders. See Section 15, "Federal Income Tax Consequences."

To the extend that shares of Stock are purchased by the Company pursuant to the Offer, the number of shares that would have to be purchased by any other person in order to acquire a majority of the outstanding shares of Stock will be reduced. In the event that MITE or another offeror (if any) proceeds with an offer to purchase Stock and succeeds in acquiring more than 50% of the shares of Stock remaining outstanding, the shareholders of the Company other than MITE or such other offeror will possess, in the aggregate, a minority of the remaining shares of Stock outstanding. Such an event could adversely affect the market price or the liquidity, or both, of such remaining shares of Stock.

To the extent that shares of Stock are purchased pursuant to the Offer, there may be fewer outstanding shares of Stock remaining in the hands of shareholders willing to tender pursuant to an offer by MITE or another offeror (if any). As a result, the Offer may also have the effect of discouraging MITE or other possible offerors (if any) from making an offer to purchase shares of Stock whether for greater or for lesser consideration than that offered herein. However, there are no contracts, arrangements, understandings, or relationships between the Company and MITE or any other party regarding the making of either the Offer, MITE's proposed offer, or any other possible offer, and any decision regarding MITE's proposed offer or any other such possible offer will be made solely by MITE or by such other offeror, if any.

The purchase of shares of the Stock pursuant to the Offer will reduce the number of shares of the Stock that might otherwise trade publicly and, depending upon the number of shares so purchased, could adversely affect the liquidity and market value of the remaining shares of Stock held by the public.

The Stock is currently admitted to unlisted trading privileges on the American Stock Exchange. As of January 19, 1979, there were 2,181 record holders of shares of the Stock, and there were 866,264 shares outstanding. Depending upon the number of shares of Stock purchased pursuant to the Offer, the Stock may not continue to meet requirements for continued trading on the American Stock Exchange. Published guidelines of the American Stock Exchange indicate that it would consider removing the Stock from unlisted trading privileges (i) if the total number of shareholders of record were less than 600 or the number of holders of 100 shares or more were less than 400 or (ii) if the number of publicly held shares (exclusive of holdings of officers, directors, controlling shareholders or other family or concentrated holdings) were less than 200,000 or (iii) if the aggregate market value of publicly held shares (exclusive of management and concentrated holdings) were less than $1,000,000. In addition, the rules of the American Stock Exchange applicable to companies whose stock is listed require that tender offers similar to the Offer must remain open for a minimum of 14 days. While this rule is not technically applicable to the Stock because the Stock is admitted to unlisted trading privileges but not listed on the Exchange, in the event that the Offer is not extended past the Initial Expiration Date and is not held upon for a total of at least 14 days, the Exchange might take action to deny unlisted trading privileges to the Company and thereby cease to permit trading of the Stock on the Exchange.

If the American Stock Exchange were to cease to permit trading of the Stock, the Stock might still be traded in the over-the-counter market and price quotations might be available through the National Association of Securities Dealers Automated Quotation System ("NASDAQ") or other sources. The availability of such quotations would,

however, depend upon the number of shares of the Stock held by the public after the Offer, the interest in maintaining a market in the Stock on the part of securities firms, the possible termination of registration under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), as described below, and other factors. Depending upon similar factors, shares of the Stock might no longer constitute "margin securities" for the purposes of the margin regulations of the Board of Governors of the Federal Reserve System and, in such event, could not be used as collateral for margin loans.

The Stock is presently registered under the Exchange Act. Registration of the Stock under the Exchange Act may be terminated upon application by the Company to the Securities and Exchange Commission (the "Commission") if there are fewer than 300 record holders of shares thereof. Such deregistration under the Exchange Act would reduce the information required to be transmitted by the Company to its shareholders and to the Commission and would make certain of the provisions of the Exchange Act, such as the short-swing profit recovery provisions of Section 16(b) thereof and the proxy statement requirements of Section 14(a) thereof in connection with shareholders' meetings no longer applicable to the Company. In addition, in the event of such deregistration, the Stock would not be eligible for NASDAQ reporting and shares thereof would not constitute "margin securities" for purposes of the margin regulations of the Board of Governors of the Federal Reserve System. The Company has made no determination with respect to whether it would seek to terminate the Exchange Act registration of the Stock if there remained fewer than 300 holders of record of the Stock following consummation of the Offer.

The purchase of shares of Stock pursuant to the Offer will also reduce the funds available to the Company for general

business purposes and for the payment of dividends and the redemption or repurchase of shares which remain outstanding after such purchase. See Section 11, "Description of the Stock."

9. *Certain Financial Effects of Offer.* The Company's net income per share of Stock will increase on a pro forma basis as a result of the purchase of shares of Stock pursuant to the Offer, but the exact effect on net income per share will depend upon the number of shares purchased and the Company's future income. The following table sets forth the pro forma effect of the purchase of 350,000 shares of Stock pursuant to the Offer on net income for the year ended December 31, 1977, and on net income for the nine months ended September 30, 1978, assuming that (i) such purchase occurred at the beginning of such periods, respectively, (ii) the Company's total expenses and fees incurred in connection with the purchase were $200,000; (iii) the Company utilized $4,150,000 in funds that otherwise would have been invested throughout the year in U.S. Government securities and time deposits; (iv) the Company borrowed $6,550,000 in funds to finance such purchase, at an average interest rate of ½ of 1% in excess of a prime rate averaging 11½% during the relevant periods; and (v) that during the relevant periods there was a constant principal balance of $6,550,000, an unused portion of the available credit of $3,450,000, and a compensating account balance of zero:

	Nine Months Ended September 30, 1978		Year Ended December 31, 1977	
	Actual	Pro Forma	Actual	Pro Forma
Interest Expense, (including Commitment Fee and Balance Deficiency Fee)	$ —	$ 731,813	$ —	$ 975,750
Interest Income from U.S. Government Securities and Time Deposits	328,808	118,887	354,594	134,988
Net Income (after Taxes)*	1,559,839	1,088,972	2,447,946	1,850,268
Outstanding common shares during period	866,264	516,264	866,264	516,264
Earnings Per Share of Stock	$1.80	$2.11	$2.83	$3.58

* Pro forma net income after taxes reflects lower interest income resulting from the net decrease in funds available for short-term investment at an assumed rate of return, and interest paid on amounts borrowed, and assuming a tax rate of 50%.

Set forth below is the Company's capitalization and book value per share of Stock at September 30, 1978, and as adjusted assuming 350,000 shares of Stock had been purchased by the Company on that date at a price of $30.00 per share and held in the corporate treasury, and assuming total expenses and fees of $200,000:

	At September 30, 1978	
	Reported	As Adjusted
Notes Payable	$ —	$ 6,550,000
Shareholder's equity		
Preferred stock, no par value	—	—
Common stock, $2.00 par value	1,737,928	1,737,928
Additional paid-in capital	682,792	682,792
Retained earnings	18,490,690	18,490,690
	$20,911,410	$20,911,410
Less treasury stock at cost	(66,868)	(10,766,868)
Total shareholders' equity	$20,844,542	$10,144,542
Total capitalization	$20,844,542	$16,694,542
Book value per share of common stock*	$24.06	$19.65

* Book value per share of Common Stock is equal to total shareholders' equity divided by the number of shares of Stock outstanding.

Shares of Stock purchased pursuant to the Offer will initially be held as treasury shares. The Company has not decided whether it will subsequently retire all or any of such shares.

The purchase of shares of Stock pursuant to the offer will also reduce the funds available to the Company for the payment of dividends and the redemption or repurchase of shares which remain outstanding after such purchase. See Section 11, "Description of the Stock."

10. *Price Range of the Stock; Dividends.* The Stock is admitted to unlisted trading privileges on the American Stock Exchange. The following table sets forth, for the periods indicated, the high and low sales prices for shares of Stock, as reported by published financial sources, and the amount of dividends paid per share:

	Per Share		Dividends Paid
	High	Low	
1976			
First Quarter	$20¾	$15⅞	$.40
Second Quarter	20⅞	18¾	.40
Third Quarter	22¾	20½	.40
Fourth Quarter	25	20¼	.55
1977			
First Quarter	28¼	24⅜	.40
Second Quarter	25⅜	22½	.40
Third Quarter	25	22¼	.40
Fourth Quarter	24¼	22¼	.65
1978			
First Quarter	24	22½	.40
Second Quarter	23½	22⅜	.40
Third Quarter	26	22¼	.40
Fourth Quarter	25⅞	22½	.65
1979			
First Quarter (through February 2, 1979)	29¼	21⅜	—

Since January 19, 1979, the date of MITE's first announcement of its proposed offer to purchase the stock at a price of $28.00 net per share, the Stock has traded on the American Stock Exchange at prices ranging from $28⅛ to $29¼ per share. On February 2, 1979, the last full day of trading prior to the commencement of the Offer, the closing price per share of the Stock was $28⅜. That price was less than the amount which an independent firm of investment and financial analysts recently determined to be the value of a share of Stock to a person seeking a controlling interst in the Company. See Section 8, "Purposes and Possible Effects of Offer." The closing price of the Stock on the American Stock Exchange on Janury 12, 1979, was $22⅜.

Shareholders may wish to obtain a current market quotation for the Stock from a broker or a newspaper before acting on the offer.

11. *Description of the Stock.* As of February 5, 1979, the authorized capital stock of the Company consisted of 2,000,000 shares of the Stock, of which 866,264 shares were issued and outstanding and 2,700 shares were issued and held in treasury, and 500,000 shares of Preferred Stock, no par value, none of which were either issued or outstanding.

Each share of the Stock entitles the holder thereof to one vote on any matter properly brought before the shareholders for action, and votes may be cumulated in the election of directors. Shareholders to not have, as a matter of right, any pre-emptive rights with respect to the issuance by the Company of shares of any class or of instruments convertible into shares of any class. In the event of a liquidation of the Company, the holders of the Stock would be entitled to receive all distributions available to the Company's shareholders, subject only to the rights of the holders of Preferred Stock then

outstanding (if any) to first receive the entire liquidation value per share of such Preferred Stock.

The Company is not presently a party to any agreement, indenture or other instrument limiting or prohibiting the declaration or payment of dividends of any nature on the Stock; however, under the agreement which the Company will be required to execute in connection with the Loan, the Company expects to enter into certain covenants which under some circumstances could have the effect of limiting or preventing the declaration and payment of dividends by the Company. See Section 3, "Payment of Purchase Price: Source of Funds." The Company's ability to declare or pay dividends is also subject to the provisions with respect thereto imposed on all corporations organized under the Illinois Business Corporation Act by that statute. See Section 10, "Price Range of the Stock; Dividends."

The Illinois Business Corporation Act prohibits a corporation organized thereunder from paying dividends if at the time of declaration or payment or as a result of payment thereof the net assets of the corporation would be reduced below its stated capital. In addition, dividends on common stock may be paid only to the extent of the unrestricted earned surplus of the corporation (excluding amounts representing the cost of treasury shares held by the corporation). The Act also limits redemptions or repurchases of common stock by corporations having no preferred stock outstanding to an amount equal to the net assets of the corporation (excluding amounts representing the cost of treasury shares) less the sum of the corporation's stated capital, paid-in surplus, any surplus arising from unrealized appreciation in value or revaluation of its assets, and any surplus arising from surrender to the corporation of its own shares.

At September 30, 1978, the Company's stated capital amounted to $1,737,928, its net assets were $20,844,542 (excluding $66,868 representing the cost of treasury shares), its paid-in surplus was $682,792, and it had no other surplus other than earned surplus of $18,423,822 (excluding $66,868 representing the cost of treasury shares). Thus the total amounts legally available for the payment of dividends and for redemptions and repurchases of the Stock were $18,423,822.

The result of the purchase of shares of the Stock pursuant to the Offer, assuming that such shares are held in treasury rather than cancelled, will be to reduce the Company's total assets and unrestricted earned surplus (excluding amounts representing the cost of treasury shares) by the aggregate amount of the purchase price paid for all shares of stock purchased. In addition, the Company's total liabilities will be increased by the principal amount borrowed from the Bank under the commitment for the Loan. The reduction of total assets and the increase in total liabilities will reduce net assets. Therefore, two effects of the purchase of shares of the Stock pursuant to the Offer will be to reduce the total amounts legally available for the payment of dividends on shares of the Stock which are not tendered to the Company and remain outstanding after the conclusion of the Offer, and to reduce the total amounts legally available for any subsequent repurchase or redemption of such shares by the Company.

In the event that 350,000 shares are purchased pursuant to the Offer, per share, immediately following such purchase the Company's unrestricted earned surplus would be approximately $7,723,822 and its net assets would be approximately $10,144,342 (in each case excluding approximately $10,766,868 representing the aggregate cost of treasury shares exclusive of expenses and fees, and assuming no changes in the Company's capitalization, assets or liabilities since

September 30, 1978 other than as affected by such purchase). The total amounts legally available for the payment of dividends and for repurchase and redemption of the Stock would thus be approximately $7,723,822. See Section 3, "Payment of Purchase Price: Source of Funds," Section 8, "Purposes and Possible Effects of Offer" and Section 9, "Certain Financial Effects of Offer."

12. *Participation of Officers and Directors.* As of February 5, 1979, the directors and executive officers of the Company and its subsidiaries, as a group, held of record or, to the knowledge of the Company, beneficially, an aggregate of 101,904 shares of Stock (including 21,600 shares held by the Chicago Rivet & Machine Co. Employees' Trust, of which several of the executive officers and directors of the Company are co-trustees), comprising approximately 11.8% of the aggregate number of then outstanding shares of the Stock on that date. In the event that 350,000 shares of Stock are purchased by the Company pursuant to the Offer, the aggregate percentage ownership by the directors and executive officers of the Company of the outstanding shares of Stock will increase to approximately 19.7%, thereby increasing the aggregate voting power which such directors and executive officers could exercise, relative to other shareholders of the Company.

The Company's directors and executive officers have all advised the Company that they have no present intention to tender any shares of Stock to the Company pursuant to this offer. They have also all advised the Company that they have no present intention to purchase any shares of Stock.

During 1977, the Company entered into an agreement with Mr. Ralph W. Jindrich, who is presently the Company's Chairman of the Board, President, and Chief Executive Officer, and who, on February 5, 1979, owned 200 shares of

Stock (not including 21,600 shares owned by Chicago Rivet & Machine Co. Employees' Trust, of which Mr. Jindrich is a participant and co-trustee). The agreement provides for Mr. Jindrich to be employed by the Company as Chief Executive Officer for a term commencing January 1, 1977 and ending December 31, 1982, at an annual compensation of $80,000, plus such additional amounts as the Board of Directors of the Company may authorize. The agreement also provides for certain severance payments and for disability and death benefits. Mr. Jindrich has agreed that, during the period compensation is payable to him pursuant to such agreement, he will not compete directly or indirectly with the Company or its subsidiaries.

Other than Mr. Jindrich, no director is employed by the Company or receives any compensation from it, except that the Company pays annual fees of $6,000 to each director (other than Mr. Jindrich) and additional annual fees of $8,000 to each member of the Executive Committee (other than Mr. Jindrich).

13. *Certain Conditions of Offer.* The Company may without notice amend any of the terms of this Offer or decline to purchase or pay for any shares of the Stock tendered, if prior to the time of payment therefor, there shall have occurred any of the following events which, in the Company's sole judgment, would make it advisable to so amend this Offer or not to proceed with such purchase or payment:

(a) any government agency or other person shall have instituted or threatened any action or proceeding before any court or administrative agency or otherwise shall have taken steps against the Company (i) challenging the acquisition of shares of stock pursuant to the Offer or otherwise in any manner relating to the Offer or (ii)

otherwise materially adversely affecting the Company, or there shall have occurred any material adverse development in any existing action or proceeding; or

(b) any state of war, national emergency, banking moratorium or suspension of payments by banks in the State of Illinois shall have occurred, or any currency or exchange control laws or regulations or general suspension of trading or limitation of prices on the American Stock Exchange shall have been imposed; or

(c) there shall have been any material adverse change in the business, financial condition or operations of the Company; or

(d) an offer shall be made to the Company or its stockholders to acquire the Stock or the business and assets of the Company at a price equal or equivalent to more than $30.00 net per share.

The Company also reserves the right to amend this Offer without notice in the event that MITE's offer is amended.

Any shares of Stock which are tendered to the Company, but by reason of the provisions of this Section 13 are not purchased, shall be returned to the tendering shareholders as soon as practicable.

14. *General Information About the Company.* The Company is subject to the reporting requirements of the Exchange Act and in accordance therewith files reports and other information with the Commission, including consolidated financial statements and descriptions of its business. The Company's annual report on Form 10-K for the year ended December 31, 1977 and its quarterly report on Form 10-Q for the quarter ended September 30, 1978 have previously been filed with the Commission. Information for 1978 concerning the Com-

pany's directors and officers, their remuneration, options granted to them and any material interest of such persons in transactions with the Company is disclosed in its proxy statement filed with the Commission and distributed to the Company stockholders in connection with the Company's annual stockholders' meeting for 1978. Such reports, the proxy statement and other information may be inspected at the Public Reference Room of the Commission, Room 6101, 1100 L. Street, N.W., Washington, D.C. or may be obtained from the Commission at 500 North Capitol Street, N.W., Washington, D.C. 20549, upon payment of the Commission's customary charges.

The Company has previously distributed to its stockholders its Annual Report for the year 1977, which includes audited consolidated financial statements of the Company and its subsidiaries for 1977 and discussions of the Company's outlook for 1978. The Company has also recently distributed to its shareholders its Interim Report for the quarter ended September 30, 1978, which includes unaudited consolidated financial statements for the nine months ended on that date. Except as described below in Section 16 of this Offering Circular, since September 30, 1978 there have been no material changes in the business, assets, operations, or financial condition of the Company or its subsidiaries.

Additional copies of the reports and other documents mentioned above may be obtained by calling the executive offices of the Company at (312) 544-5100.

15. *Federal Income Tax Consequences.* Holders of shares of the Stock who sell shares to the Company for cash pursuant to the Offer will have the following Federal income tax consequences:

1. The sale of shares of the Stock to the Company will be a taxable transaction to the tendering shareholder.

2. A tendering shareholder will recognize capital gain or loss (if the shares of the Stock are a capital asset in the tendering stockholder's hands) measured by the difference between (i) the amount of cash received on such sale and (ii) such shareholder's tax basis for the shares, if any, if the following conditions are satisfied: (a) such shareholder sells all of the shares of the Stock owned by him of record and beneficially; (b) such shareholder sells a sufficient number of shares of Stock so that his percentage share of the capital stock of the Company outstanding after the sale is consummated is less than 80% of his percentage share of the capital stock of the Company outstanding immediately prior to such consummation; or (c) the sale is not essentially equivalent to a dividend. In applying these tests, a shareholder would be deemed to own shares of the Stock attributed to him under the constructive ownership rules in addition to shares actually owned by him.*

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* Under the constructive ownership rules of Section 318 of the Internal Revenue Code of 1954, as amended, a shareholder will be deemed to own shares of the Stock owned by certain corporations, partnerships, estates and trusts in which such shareholder has a beneficial interest, shares as to which such shareholder has an option and, except where the shareholder terminates his entire interest in the Company and complies with certain other requirements set forth in the Internal Revenue Code of 1954, as amended, shares owned by certain members of such shareholder's family. Selling shareholders should consult their own tax advisors for application of the constructive ownership rules to them.

3. If a shareholder is not treated as having sold his shares of the Stock in a transaction which qualifies for capital gain treatment, such shareholder will be deemed to have received a distribution in the amount of the cash received in the transaction. Such distribution would be taxed as a dividend to the extent of the Company's available current and accumulated earnings and profits, regardless of such shareholder's tax basis for the shares. The remaining part of such distribution, if any, would be a return of capital (to the extent of such stockholder's basis in his shares) and any excess would be capital gain, assuming the shares are held as a capital asset.

The recently enacted Revenue Act of 1978 has made significant changes in the taxation of capital gains. The Act generally reduces the amount of taxes payable on long-term capital gains recognized by non-corporate taxpayers after October 31, 1978 (with a possible further reduction, effective with respect to gains recognized in taxable years after 1978, for certain taxpayers, subject to the possible application of an alternative minimum tax) and reduces the alternative tax rate payable by corporate taypayers on long-term capital gains recognized after December 31, 1978.

The Federal income tax discussion set forth above is included for general information only. The tax consequences of a sale of shares of the Stock to the Company pursuant to the Offer may vary, depending upon the particular circumstances of the tendering shareholder.

EACH SHAREHOLDER IS URGED TO CONSULT HIS TAX ADVISOR TO DETERMINE THE PARTICULAR FEDERAL, AS WELL AS STATE AND LOCAL, TAX CONSEQUENCES TO HIM OF A SALE OF HIS SHARES OF THE STOCK.

16. *Recent Developments and Litigation.* On January 19, 1979, MITE and Holdings filed an action in the United States District Court for the Northern District of Illinois in Chicago against the Company and the Secretary of State of Illinois seeking a declaratory judgment that the Illinois Business Takeover Act ("Illinois Act") is unconstitutional and an injunction against any attempt by the Company or the Secretary to invoke or enforce any provisions of the Illinois Act in connection with MITE's proposed offer to acquire the stock of the Company (the "Proposed Offer"). MITE stated in its complaint that it had not complied with the provisions of the Illinois Act or any other state laws regulating tender offers, and indicated that it did not intend to do so.

On January 22, 1979 the Company filed a lawsuit in the Court of Common Pleas of Blair County, Pennsylvania against MITE. Holdings, all of their respective officers and directors, Wertheim & Co., Inc., the dealer-manager of MITE's Proposed Offer, and Wertheim & Co., a partnership which owns the stock of Wertheim & Co., Inc. This lawsuit alleges that the Proposed Offer was being made in violation of the Pennsylvania Takeover Disclosure Law ("Pennsylvania Law") and the Pennsylvania Securities Act of 1972 ("Pennsylvania Securities Act") and seeks to enjoin the defendants from taking any further action to consumate the Proposed Offer or to otherwise acquire any of the Stock of the Company without first complying with the aforesaid Pennsylvania laws. On January 22, 1979, the Court of Common Pleas of Blair County entered a preliminary injunction barring the defendants in that action from taking any steps to consummate MITE's Proposed Offer or otherwise acquiring any shares of the Stock of the Company without first complying with the Pennsylvania Law and Pennsylvania Securities Act.

On January 22, 1979 the Company also filed a complaint with the Pennsylvania Securities Commission ("Commission") against MITE, Holdings and the directors and officers of each of them. The complaint alleges that defendants have violated the Pennsylvania Law and the Pennsylvania Securities Act in connection with the Proposed Offer and requests that the Commission take steps to prevent the defendants from proceeding with the Proposed Offer until they comply with the aforesaid laws.

On January 23, 1979 the Pennsylvania state court litigation was removed from the jurisdiction of the Court of Common Pleas of Blair County to the United States District Court for the Western District of Pennsylvania in Pittsburgh.

On January 24, 1979 MITE and Holdings filed an action against the Company, the members of the Commission and the Acting Attorney General of Pennsylvania in the United States District Court for the Western District of Pennsylvania seeking a declaratory judgment that the Pennsylvania Law is unconstitutional and an injunction against any attempt by the Company and the Commonwealth of Pennsylvania defendants to invoke or enforce that Law against plaintiffs in connection with the Proposed Offer. On February 1, this action was dismissed by the Court against all defendants except the Company as moot in light of the January 31 decision of the Pennsylvania Securities Commission discussed below.

At a hearing before the federal court in Pittsburgh on January 23, a status quo order was entered requiring that none of the parties take any steps with regard to the Proposed Offer until a hearing before the court on January 30, 1979. This status quo order was thereafter extended to February 1, 1979, at which time a further hearing was held before the court. At that hearing, the court denied the Company's re-

quest to extend the status quo order or to otherwise enjoin MITE from proceeding with the Proposed Offer in light of the January 31 decision of the Pennsylvania Securities Commission discussed below.

On January 31, after hearing argument by the parties and reviewing their written submission, the Commission issued an order declaring that it had no jurisdiction to regulate the Proposed Offer because, under its interpretation of the applicable law, the Company does not have its principal place of business in Pennsylvania.

On February 1, 1979, the Company filed an application for rehearing by the Commission of its January 31 order.

On February 1, the Company also filed a petition for review of the Commission's decision with the Commonwealth Court of Pennsylvania in Harrisburg, as well as a request that the Commonwealth Court grant injunctive relief with respect to MITE's Proposed Offer pending the court's review of the Commission's decision. On February 5, the Commonwealth Court held a hearing on the Company's request for injunctive relief and thereafter denied that request.

On February 2, 1979, the federal district court in Chicago entered an order preliminarily enjoining the Illinois Secretary of State from taking any action to invoke or enforce the Illinois Act in connection with the Proposed Offer. While not directly enjoined by order, the Company is also effectively barred by the order from seeking to invoke the Illinois Act with regard to MITE's Proposed Offer. The Court also set the case for a hearing on the merits on February 8, 1979.

17. *Solicitation and Other Fees.* The Company will pay to any broker or dealer who is a member of any national securities exchange or of the National Association of Securities Dealers, Inc. ("NASD"), any foreign broker or dealer who agrees in

connection with the Offer to conform to the Rules of Fair Practice of the NASD, or any commercial bank or trust company ("Soliciting Dealer"), who has solicited the tender of shares of Stock and whose name appears in the appropriate space provided in the Letter of Tender tendering such shares, a solicitation fee of 30 cents for each such share purchased pursuant to the Offer.

Except as set forth above, the Company will not pay any fees or commissions to any broker, dealer or other person for soliciting tenders of shares of Stock pursuant to the Offer.

No broker, dealer, commercial bank or trust company will be the agent of the Company or the Depositary for purposes of the Offer, except that the Offer is being made through the firm of Drexel Burnham Lambert, Incorporated in Louisiana, Indiana, and Ohio as required by the law of those states.

The Depositary will receive reasonable and customary compensation for its services and will also be reimbursed for certain out-of-pocket expenses and indemnified against certain liabilities and expenses in connection with the Offer.

Hill and Knowlton, Inc. has been retained by the Purchaser as Information Agent in connection with the Offer. Such firm will receive customary compensation from the Company for services relating to the Offer and will be reimbursed for certain out-of-pocket expenses in connection therewith and indemnified against certain liabilities and expenses in connection with the Offer.

18. *Miscellaneous.* The Offer is not being made to, nor will the Company accept tenders from, holders of shares of Stock in any state of the United States or in any foreign jurisdiction in which the Offer or the acceptance thereof would not be in compliance with the securities or blue sky laws of such state or foreign jurisdiction; however, the Company may, in its

discretion, take such action as it may deem necessary to enable it to make the Offer and accept tenders of shares of the Stock from shareholders in any such jurisdiction. In those jurisdictions whose laws require the Offer to be made by a licensed broker or dealer, the Offer is made on behalf of the Company by one or more registered brokers or dealers which are licensed under the laws of such jurisdiction.

CHICAGO RIVET & MACHINE CO.

Facsimile copies of the Letter of Tender will be accepted. The Letter of Tender and certificates for your shares of Stock should be sent or delivered by you, your broker, dealer, bank or trust company to the Depositary at one of its addresses set forth below:

The Depositary:

THE FIRST NATIONAL BANK OF CHICAGO

By Mail:	*By Hand:*
The First National Bank of Chicago	The First National Bank of Chicago
Corporate Trust Division	Corporate Trust Division
P.O. Box A	40 West Adams Street, 8th Floor
Chicago, Illinois 60690	Chicago, Illinois 60690

Shareholders should contact their broker, dealer, commercial bank or trust company for assistance concerning the Offer. Requests for additional copies of these materials and for assistance may also be directed to the Information Agent at the address and telephone number listed below:

The Information Agent:

HILL AND KNOWLTON, INC.
633 Third Avenue
31st Floor
New York, N.Y. 10017
(212) 697-9684
(call collect)

Additional copies of this Offering Circular, the Letter of Tender, and related documents may also be obtained from Drexel Burnham Lambert Incorporated, at its offices at 60 Broad Street, New York, N.Y. 10004. Prospectus Department, 14th Floor, (212) 480-6000, or at its offices at 230 West Monroe Street, Chicago, Illinois 60606, (312) 977-3000.

CHICAGO RIVET & MACHINE CO.

February 5, 1979

To the Holders of Common Stock of
Chicago Rivet & Machine Co.:

Dear Stockholder:

There are enclosed for your consideration materials relating to an Offer by Chicago Rivet & Machine Co. (the "Company") to acquire 350,000 shares of its Common Stock, for cash at $30.00 net per share. The terms and conditions upon which the Offer is made are set forth in the accompanying Offering Circular and related Letter of Tender, which contain the complete terms of the Company's Offer and which you should read carefully.

MITE Corporation ("MITE"), through its wholly-owned subsidiary, MITE Holdings, Inc., has commenced a tender offer for all or any shares of Common Stock of the Company for cash at $28.00 net per share.

The Board of Directors of the Company recommends against any shareholder tendering his shares pursuant to either MITE's offer or pursuant to the enclosed Offer. You should be aware that holders of 285,000 shares of the Company's stock, including all directors and officers of the Company, have indicated that they will not tender any shares pursuant to either offer.

If you nevertheless wish to tender all or some of your Common Stock to the Company, please follow the instructions in the enclosed Letter of Tender and in the enclosed Offering Circular under the caption, "Tender of Shares."

If more than 350,000 shares of the Company's stock are tendered to the Company pursuant to the enclosed Offer, the Company will not be obligated to purchase any of the excess. If the Company receives tenders of more than 350,000 shares during the initial offering period and purchases less than all of such shares, it will accept shares (but not less than 350,000 shares) pro rata according to the number of shares tendered by each shareholder (except that the Company will purchase all shares of any person who on February 5, 1979 held less than 100 shares of the Company's stock and who tenders all of his stock to the Company).

Should you wish to avoid retaining any of the Company's stock if the Company elects to purchase less than all shares tendered, you may authorize the Depositary as your agent to tender your excess shares, if any, to MITE, for purchase by MITE, subject to all of the terms and conditions of MITE's offer. If you elect this course, you must place an "X" in the box captioned "Tender Over of Excess Shares to MITE" on the enclosed Letter of Tender. In addition, you must of course also follow all of the other instructions contained in the enclosed Letter of Tender and Offering Circular with respect to your tender of shares to the Company. The Depositary will

then tender to MITE the excess shares, if any, which would otherwise have been returned to you by the Company, unless MITE's offer shall previously have been withdrawn. In the event of such prior withdrawal of MITE's offer, the excess shares will be returned to you as soon as practicable.

If you have any questions or require assistance, you may contact the Company's Information Agent, Hill and Knowlton, Inc. collect at (212) 697-9684.

If your shares of Common Stock are held by your bank or broker and you desire to accept the Offer, you should instruct your bank or broker to accept the Offer on your behalf.

Please note that the Offer is scheduled to expire at 4:00 p.m., Chicago Time on February 12, 1979, unless extended. Accordingly, if you decide to accept the Offer, you are encouraged to act promptly.

Very truly yours,

CHICAGO RIVET & MACHINE CO.

February 5, 1979

To Our Clients

RE: OFFER BY CHICAGO RIVET & MACHINE CO. TO PURCHASE 350,000 SHARES OF ITS COMMON STOCK FOR CASH AT $30.00 NET PER SHARE

Enclosed for your consideration is an Offering Circular dated February 5, 1979 of Chicago Rivet & Machine Co. (the "Company"), pursuant to which the Company is offering to purchase 350,000 shares of its Common Stock duly tendered and accepted by the Company, all on the terms and conditions

set forth in the Offering Circular and the related Letter of Tender.

You are the beneficial owner of Common Stock which we hold of record in our name. A tender of such Common Stock can be made only by us as the holder of record and pursuant to your instructions below. If you authorize tender of your Common Stock, all such Common Stock will be tendered unless a lesser number is specified below. You also have an option to direct the Depositary to tender over to MITE Holdings, Inc., pursuant to its current offer to purchase the Company's Common Stock, any of your tendered shares which are not purchased by the Company pursuant to its Offer.

The Letter of Tender is furnished to you for your information only and cannot be used by you to tender your Common Stock. Please note that tenders must be received by the Depositary prior to 4:00 p.m. Chicago Time, on February 12, 1979, unless the Offer is extended by the Company. Accordingly, your instructions to us should be forwarded to us as to permit us to tender shares on your behalf prior to the expiration of the Offer.

INSTRUCTIONS

Please tender to Chicago Rivet & Machine Co. on (our) (my) behalf the shares of Common Stock, $2.00 par value, of Chicago Rivet & Machine Co. indicated below which are owned by (us) (me) and registered in your name, pursuant to the terms and conditions contained in the Offering Circular dated February 5, 1979 and the related Letter of Tender, the receipt of which is hereby acknowledged.

_____

_____

(Signature(s))

_____

_____

Please print name(s) here

Number of shares to be tendered*:

_____

* Unless otherwise indicated herein, it will be assumed that all of your shares are to be tendered.

☐ Check this box if you wish the Depositary to tender over to MITE Holdings, Inc. any of your tendered shares which the Company does not purchase, as set forth in the Company's Offer to Purchase under the heading, "Tendering Over of Excess Shares".

DREXEL BURNHAM LAMBERT INCORPORATED
60 Broad Street
New York, New York 10004

February 5, 1979

To Stockholders of Chicago Rivet
& Machine Co. in Louisiana, Indiana, and Ohio:

On behalf of Chicago Rivet & Machine Co. (the "Company") and as required by the securities laws of your state, we enclose documents relating to an Offer by the Company to purchase shares of its outstanding Common Stock. This letter is not a solicitation for you to accept the Offer, and we make

no recommendation as to what action, if any, you should take with respect to the Offer.

Very truly yours,

DREXEL BURNHAM LAMBERT INCORPORATED

Enclosures

February 5, 1979

To Securities Brokers and Dealers, Banks
and Trust Companies:

RE: OFFER BY CHICAGO RIVET & MACHINE CO. TO PURCHASE 350,000 SHARES OF ITS COMMON STOCK FOR CASH AT $30.00 NET PER SHARE

We are asking you, as the record holder of shares of Common Stock, $2.00 par value (the "Common Stock"), of Chicago Rivet & Machine Co. (the "Company"), to bring to the attention of your clients for whom you hold Common Stock the offer being made by the Company to purchase 350,000 shares of Common Stock for cash at $30.00 net per share.

For your information, we are enclosing herewith the following material:

1. Copy of Offering Circular dated February 5, 1979.

2. Letter of Tender for your use and for the information of your clients.

3. A printed form of letter which may be sent to your customers for whose account you hold Common Stock in your name, with space provided for obtaining such customers' instructions with regard to the Offer to Purchase.

4. Envelopes addressed to The First National Bank of Chicago, the Depositary, to be used by you to return Letters of Tender and certificates for shares of Common Stock.

A solicitation fee of 30 cents for each share of Common Stock purchased pursuant to the Offer to Purchase will be paid by the Company to any broker or dealer who is a member of any national securities exchange or of the National Association of Securities Dealers, Inc. ("NASD"), any foreign broker or dealer who agrees in connection with the Offer to conform to the Rules of Fair Practice of the NASD, or any commercial bank or trust company ("Soliciting Dealer"), who has solicited the tender of Shares and whose name appears in the appropriate space provided in the Letter of Tender tendering such shares.

The Company will upon written request reimburse you for customary mailing and handling expenses incurred by you in forwarding the enclosed material to your clients. The Company will pay any transfer taxes payable on the transfer of shares to it, except as otherwise provided in Instruction 4 to the Letter of Tender.

Acceptance of compensation by you for soliciting tenders of shares of Common Stock will constitute your representation and agreement that (i) you have complied with the requirements of, and are entitled to receive compensation for solicitation in accordance with, the provisions of the Offer to Purchase; (ii) in connection with such solicitation, you have complied with and will comply with the applicable requirements of the Securities Exchange Act of 1934, as amended, any applicable laws of any jurisdiction of the United States, and the applicable rules and regulations thereunder; and (iii) in soliciting tenders you have used no soliciting materials other than those furnished to you by or on behalf of the Company.

We urge you to contact your customers promptly. Please note that, unless extended, the Offer to Purchase terminates at 4:00 p.m., Chicago Time, on February 12, 1979.

Questions on requests for additional copies of the enclosed materials should be directed to the Company's Information Agent, Hill and Knowlton, Inc. at the addresses and telephone numbers shown in the enclosed Offering Circular. Additional copies of the enclosed materials may also be obtained from Drexel Burnham Lambert Incorporated, at any of their offices listed in the Offering Circular.

NOTHING HEREIN OR IN THE DOCUMENTS HEREWITH ENCLOSED SHALL CONSTITUTE YOU THE AGENT FOR THE COMPANY OR THE DEPOSITARY OR AUTHORIZE YOU TO MAKE ANY STATEMENTS ON THEIR BEHALF WITH RESPECT TO THE OFFER TO PURCHASE OTHER THAN THE STATEMENTS SPECIFICALLY SET FORTH HEREIN.

LETTER OF TENDER

TO TENDER COMMON STOCK OF CHICAGO RIVET & MACHINE CO.
IN ACCEPTANCE OF OFFER DATED FEBRUARY 5, 1979
OF CHICAGO RIVET & MACHINE CO.

Important: This Offer expires at 4:00 p.m., Chicago, Illinois time,
on February 12, 1979, unless extended.

Mailing Address	Hand Deliveries
To Depositary:	
The First National Bank of Chicago	The First National Bank of Chicago
Corporate Trust Division	Corporate Trust Division
P.O. Box A	40 West Adams—8th Floor
Chicago, Illinois 60690	Chicago, Illinois

The undersigned hereby tenders to Chicago Rivet & Machine Co., an Illinois corporation (the "Company"), the shares of the Common Stock, par value $2.00 per share (the "Shares"), of the Company described below in accordance with the terms of the Company's Offer to Purchase dated February 5, 1979 (the "Offer"), receipt of which is hereby acknowledged, and, in consideration of the payment of the purchase price, the undersigned hereby sells, assigns and transfers such Shares to the Company. If the box below relating to the tender over of Excess Shares is marked, the undersigned hereby directs the Depositary, on behalf of the undersigned, to tender over all of the undersigned's tendered Shares which the Company does not purchase to MITE Holdings, Inc., a wholly-owned subsidiary of MITE Corporation (both such corporations

being collectively referred to hereinafter as "MITE"), pursuant to MITE's current Offer to Purchase Common Stock of the Company.

The undersigned's name and address are printed below as they appear in the undersigned's certificate(s) representing Shares of the Company. The certificate number(s) and the number of Shares of the Company represented by such certificate(s) and the number of Shares of the Company that the undersigned wishes to tender are indicated in the appropriate boxes.

Certificates Number	Number of Shares Represented by Certificate	Number of Shares Tendered from Certificate*

* If you desire to tender fewer than all of the Shares which are evidenced by any certificate delivered pursuant to this Letter of Tender, please indicate in this column the number of Shares being tendered. Otherwise, it will be assumed that all the Shares evidenced by delivered certificates are tendered. If the space provided in the above box is inadequate, please complete the requested information on a separate schedule and attach the schedule hereto.

Guarantee of Delivery

Available ONLY if this Letter of Tender is received prior to 4:00 p.m., Chicago, Illinois time, February 12, 1979.

The undersigned,

☐ **a member of a national securities exchange or the National Association of Securities Dealers, Inc.,**

☐ **a bank in the United States,**

☐ **a trust company in the United States,**

guarantees to deliver to the Depositary, in proper form for transfer, certificates for the Shares tendered by this Letter of Tender not later than the close of business on the eighth business day after the date hereof.

Dated: .....

Firm Name .....

Address .....

.....

Authorized by .....

Area Code & Telephone Number .....

The undersigned represents that he has full authority to sell and to transfer the tendered Shares, and that the Company will acquire good title thereto, free and clear of all pledges, security interests, liens, claims and encumbrances. The undersigned will upon request, execute any additional documents necessary to complete the sale and transfer of the tendered Shares. All authority conferred or agreed to be conferred in this Letter of Tender shall be binding upon the successors, assigns, heirs, executors, administrators and legal representatives of the undersigned and shall not be affected by, and shall survive, the death or incapacity of the undersigned.

The undersigned hereby irrevocably constitutes the Depositary attorney, with full power of substitution, to deliver the tendered Shares, together with all accompanying evidences of authority, to or upon the order of the Company against receipt of the purchase price and to cause the tendered Shares to be transferred on the books of the Company.

Please deliver the check in payment for Shares purchased or the certificates for Shares not purchased to the undersigned at the address specified above unless otherwise indicated under Special Payment Instructions or Special Delivery Instructions.

SPECIAL PAYMENT INSTRUCTIONS

To be completed ONLY if proceeds are to be paid to other than the registered holder.

Issue and mail check to:

Name .....
(Please print)

Address .....

.....
(Zip Code)

SPECIAL DELIVERY INSTRUCTIONS

To be completed ONLY if certificates and/or check are to be returned to other than the registered holder.

Mail certificates and/or check to:

Name .....
(Please print)

Address .....

.....
(Zip Code)

Tax Identification or Social Security Number of Recipient .....

SIGN HERE

(Signature(s) of Stockholder(s)

Dated: .....

(Must be signed by registered holder(s) as name(s) appear on stock certificate(s) or by person(s) authorized to become registered holder(s) by certificates and documents transmitted. If signing is by attorney, administrator, stockholder, trustee or guardian, please set forth full title.)

Name(s) .....
(Please print)

Address .....

.....

Area Code and Telephone Number .....

Tax Identification or Social Security Number .....

Signature(s) Guaranteed by .....

.....

Note: See Instruction 4 regarding payment of transfer taxes.

SOLICITED TENDERS

The undersigned represents that the broker, dealer, commercial bank or trust company which solicited and obtained this tender is:

Name of Firm .....

(Please Print)

Name of Individual .....

Address .....

(Zip Code)

Acceptance of compensation by the above will constitute a representation and agreement that (i) it has complied with the requirements of, and is entitled to receive compensation for solicitation in accordance with, the provisions of the Offer; (ii) In connection with such solicitation, it has complied with the applicable requirements of the Securities Exchange Act of 1934, as amended, any applicable laws of any jurisdiction of the United States, and the applicable rules and regulations promulgated thereunder; and (iii) in soliciting tenders of Shares it has used no soliciting materials other than those furnished by or on behalf of Chicago Rivet & Machine Co.

CONDITIONAL TENDER

A tendering shareholder may condition his tender of Shares upon the acceptance by the Company of a specified minimum number of shares tendered hereby, all as described in the Offer, particularly Section 5 thereof. Unless such specified minimum is purchased by the Company pursuant to the terms of the Offer, none of the Shares tendered hereby will be purchased. Unless this box has been completed and a minimum specified, the tender will be deemed unconditional.

Minimum number of Shares which must be purchased if any are purchased:

..... Shares

TENDER OVER OF EXCESS SHARES TO MITE

A tendering shareholder may direct, by placing an "X" in the box below, that any Shares tendered to the Company hereby which are not purchased by the Company (the "Excess Shares") shall be tendered over by the Depositary, on behalf of the tendering shareholder, to MITE, pursuant to MITE's current Offer to Purchase Common Stock of the Company. The Depositary shall issue in its own name one or more certificates representing all of the Excess Shares of tendering shareholders which are to be tendered over, shall tender over such certificate or certificates to MITE, and upon purchase of such Excess Shares by MITE shall forward the proceeds thereof to the respective tendering shareholders. By placing an "X" in the box below, the tendering shareholder acknowledges that he has received the Offer to Purchase published and distributed by MITE. Neither the Company nor the Depositary (1) shall have any obligation with respect to the tender over to MITE beyond the making of the

tender and the forwarding of all proceeds received therefrom to the respective tendering shareholders, nor (2) guarantee the acceptance of such Excess Shares by MITE nor the payment for such Excess Shares by MITE. Unless the box below has been checked, the Depositary will not tender over any of the tendering shareholder's Excess Shares to MITE. In the event of prior withdrawal by MITE of its Offer to Purchase, the Excess Shares will be returned to the tendering shareholder as soon as practicable.

☐ Please tender over my Excess Shares to MITE, as described above. I have read the Offer to Purchase published and distributed by MITE.

PLEASE FOLLOW THE INSTRUCTIONS ON THE REVERSE
(DO NOT WRITE IN SPACES BELOW)

Date Received			Accepted By		Checked By	
.....			.....		.....	
Shares Surrendered	Shares Tendered	Shares Accepted	Check Nos.	Amount of Check	Shares Returned	Certificate No.

Delivery Prepared By ..... Checked By ..... Date .....

INSTRUCTIONS FOR TENDER OF COMMON STOCK OF CHICAGO RIVET & MACHINE CO.

1. Tenders must be made on the Letter of Tender, or a facsimile thereof, signed by the registered holder(s) or the person(s) authorized to become a registered holder of the tendered Shares and must be received by 4:00 p.m., Chicago, Illinois time, on February 12, 1979, unless the offer is extended. Signatures on the Letter of Tender must be guaranteed by a bank or trust company in the United States or by a member firm of any registered national securities exchange or the National Association of Securities Dealers, Inc. unless the Shares being tendered thereby are tendered for the account of such bank, trust company or member firm. All stock certificates tendered by other than the registered holder must be duly endorsed in blank by the registered owner or accompanied by duly executed stock powers signed by the registered owner, with, in either case, signatures guaranteed thereon and on the Letter of Tender as provided above. If the Letter of Tender is executed by an officer on behalf of a corporation or by an executor, administrator, trustee, guardian, attorney, agent or other person acting in a fiduciary or representative capacity, proper documentary evidence must be furnished of the authority of the person executing the same. If the tendered certificates are owned of record by two or more joint owners, all such owners must sign the Letter of Tender. Questions regarding such evidence of authority may be referred to the Depositary, which is The First National Bank of Chicago, Chicago, Illinois.

2. Prior to 4:00 p.m. Chicago, Illinois time, on February 12, 1979 (such date and time being hereinafter referred to as the "Initial Expiration Date" of the Offer), or, in the event the Offer is extended, prior to the expiration date of any such extension period, tenders may be made without the concur-

rent deposit of stock certificates if such tenders are made by or through members of a national securities exchange or the National Association of Securities Dealers, Inc. or by banks or trust companies in the United States. (The later of the Initial Expiration Date and the latest time and date to which the Offer may be extended is hereinafter sometimes referred to as the "Expiration Date".) In such cases the Letter of Tender must be received prior to the Expiration Date by the Depositary, and the guarantee of delivery contained in the Letter of Tender must be executed by such member, bank or trust company. In addition, the certificates tendered thereby must be received by the Depositary within 8 American Stock Exchange trading days after the date of the Letter of Tender. Payment for Shares so tendered and purchased will be made only against timely deposit of the stock certificates and any other required documents with the Depositary. In all other cases the Letter of Tender must be accompanied by the stock certificates.

3. If a shareholder desires to tender and time will not permit his Letter of Tender to reach the Depositary before the Expiration Date, his tender may be effected if (a) his stock certificates (if available), a properly executed Letter of Tender and any other required documents have been deposited with a member of a national securities exchange or the National Association of Securities Dealers, Inc. or with a bank or trust company in the United States and (b) the Depositary has received prior to the Expiration Date a telegram or letter from such member, bank or trust company setting forth the name of the shareholder, the number of shares tendered, stating whether or not the tender is conditioned on a minimum number of shares being purchased from the shareholder (and if so, setting forth such minimum), stating whether or not the shareholder directs the Depositary to tender over shares which the Company does not purchase to MITE and stating that the

tender is being made thereby and guaranteeing that within 8 American Stock Exchange trading days thereafter the certificates representing the Shares being tendered, together with a properly completed and duly executed Letter of Tender and any other required documents, will be received by the Depositary. Payment for shares so tendered and purchased will be made only against timely deposit of the stock certificates, a properly completed and executed Letter of Tender and any other required documents with the Depositary.

4. No stock transfer tax stamps or funds to cover such stamps need accompany this instrument. The Company will pay any stock transfer taxes applicable to the transfer and sale to it, if payment of the purchase price is to be made to an assignee of the registered holder or if deposited stock certificates are not registered in the name of the person signing the Letter of Tender, the amount of any stock transfer taxes on account of the transfer to such assignee or such person will be deducted from the purchase price, if evidence of the payment of such tax is not submitted.

5. The method of delivery of this Letter of Tender, the stock certificates and any documents is at the option and risk of the holder but, except as otherwise provided in Instruction 3 above, the delivery will be deemed effective only when actually received by the Depositary. If such delivery is by mail, it is suggested that insured registered mail be used.

6. Except as provided for in this Letter of Tender, no alternative, conditional, irregular or contingent tenders will be accepted.

7. If a shareholder's Shares are registered differently on several certificates, it will be necessary for him to complete, sign and submit as many separate Letters of Tender as there are different registrations of his Shares.

8. The Company reserves the absolute right to waive any of the specified conditions in the Offer in the case of any Shares tendered or purported to be tendered.

9. Additional copies of this Letter of Tender may be obtained from the Information Agent or from Drexal Burnham Lambert Incorporated at the addresses set forth in the Offer.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MITE CORPORATION and
MITE HOLDINGS, INC.,
Plaintiffs,

v. No. 79 C 200

ALAN J. DIXON and
CHICAGO RIVET & MACHINE CO.,
Defendants.

VERIFIED ANSWER OF DEFENDANT CHICAGO RIVET & MACHINE CO. TO SECOND AMENDED COMPLAINT

Defendant, Chicago Rivet & Machine Co. ("Rivet"), by its attorneys, answers the Second Amended Complaint ("Complaint") of Plaintiffs Mite Corporation ("Mite") and Mite Holdings, Inc. ("Mite Holdings") as follows:

1. This is an action among other matters for a declaratory judgment, pursuant to 28 U.S.C. §2201, declaring each of the Illinois Business Take-Over Act, P.A. 80-1421 (as amended, effective September 8, 1978) (the "Illinois Act") and the Pennsylvania Takeover Disclosure Law (effective March 3, 1976) (the "Pennsylvania Law") to be null and void on its face and as applied to the plaintiffs, in connection with a proposed cash tender offer by MITE and MITE Holdings for any and all of the

outstanding shares of common stock of CHICAGO RIVET & MACHINE CO. ("Chicago Rivet") because the Illinois Act and the Pennsylvania Law conflict with and thus are preempted by the Securities Exchange Act of 1934, 15 U.S.C. § §78a *et seq.* (the "Exchange Act"); because the Illinois Act and the Pennsylvania Law violate the Supremacy and Commerce Clauses of the Constitution of the United States; and because the Illinois Act and the Pennsylvania Law deny rights protected by and enforceable under 42 U.S.C. §1983.

ANSWER:

1. Rivet denies each and every allegation in Paragraph 1 of the Complaint, except admits that Plaintiffs attempt to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §2201, and further states that the Illinois Business Take-Over Act ("Illinois Act") and the Pennsylvania Takeover Disclosure Law ("Pennsylvania Law") are constitutional both on their face and as applied to Plaintiffs.

2. Pursuant to Rule 65 of the Federal Rules of Civil Procedure, plaintiffs request a temporary restraining order, preliminary injunction and permanent injunction enjoining and restraining the defendant Dixon from invoking or enforcing the Illinois Act and enjoining and restraining the defendant Chicago Rivet from invoking or enforcing the Illinois Act or the Pennsylvania Law against the plaintiffs in connection with the aforementioned tender offer. Plaintiffs also seek to restrain defendant Chicago Rivet and the director-officer defendants from completing an offer by Chicago Rivet to

purchase at least 350,000 shares of its own common stock.

ANSWER:

2. Rivet denies each and every allegation contained in Paragraph 2 of the Complaint except admits that Plaintiffs request certain injunctive relief pursuant to Rule 65.

3. Plaintiff MITE is a corporation organized and existing under the laws of the State of Delaware with its principal executive offices at 446 Blake Street, New Haven, Connecticut.

ANSWER:

3. Rivet lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint.

4. Plaintiff MITE Holdings is a corporation organized and existing under the laws of the State of Delaware, with its principal executive offices at 446 Blake Street, New Haven, Connecticut.

ANSWER:

4. Rivet lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Complaint.

5. Defendant Chicago Rivet is a corporation organized and existing under the laws of the State of Illinois with its principal executive offices at 950 S. Twenty-Fifth Avenue, Bellwood, Illinois.

ANSWER:

5. Rivet admits the allegations contained in Paragraph 5 of the Complaint and further states that Rivet's principal place of business is in Blair County, Pennsylvania.

6. Defendant Alan J. Dixon is the Secretary of State of Illinois. He is charged with the administration and enforcement of the Illinois Act. He maintains an office at 188 West Randolph Street, Chicago, Illinois.

ANSWER:

6. Rivet admits the allegations contained in Paragraph 6 of the Complaint.

7. Defendants Walter W. Morrissey, John A. Morrissey, John H. Tonn, Thomas P. Ward, Paul M. Wade, Ralph W. Jindrich, and Beranard J. Hank, Jr. are and at all pertinent times have been members of the Board of Directors of Chicago Rivet. The remaining defendant officers are: Roger B. Branstetter, Vice President — Tyrone; Robert K. Brown, Vice President — Employee Relations; Clarence E. Damhorst, Vice President — Administration; Donald A. McCormick, Vice President — Manufacturing; Will E. Shineflug, Vice President — Marketing; Richard A. Keeler, Treasurer; Margaret M. O'Connell, Secretary; Timothy A. Olson, Controller; and Oliver T. Mann, Senior Vice President. The individual defendants who are directors or officers of Chicago Rivet are hereinafter collectively sometimes referred to as the director-officer defendants. The director-officer defendants,

except for Roger Branstetter, who is a resident of Pennsylvania, are residents of Illinois.

ANSWER:

7. Rivet admits the allegations contained in Paragraph 6 of the Complaint that Walter W. Morrissey, John A. Morrissey, John H. Tonn, Thomas P. Ward, Paul M. Wade, Ralph W. Jindrich, and Bernard J. Hank, Jr. are members of the Board of Directors of Rivet; that the following individuals are officers of Rivet: Roger B. Branstetter, Vice President-Tyrone; Robert K. Brown, Vice President-Employee Relations; Clarence E. Damhorst, Vice President-Administration; Donald A. McCormick, Vice President-Manufacturing; Richard A. Keeler, Treasurer; Margaret M. O'Connell, Secretary; and Oliver T. Mann, Senior Vice President, and denies the remaining allegations contained in Paragraph 7 of the Complaint.

8. Defendant Walter W. Morrissey owns 18,558 shares of Chicago Rivet common stock which include 5,824 shares owned individually, 1,002 shares held beneficially, 2,152 shares held as co-trustee of a trust in which he has a beneficial interest, and 9,580 shares held in other trusts of which he is a co-trustee.

ANSWER:

8. Rivet denies each and every allegation contained in Paragraph 8 of the Complaint except admits that Walter W. Morrissey beneficially holds 1,002 shares of Rivet common stock.

9. Defendant John A. Morrissey owns 13,686 shares of Chicago Rivet common stock which include 5,079 shares owned individually, 3,592 shares owned beneficially, 3 shares held as custodian for his

son, and 5,012 shares held in six trusts of which he is a co-trustee.

ANSWER:

9. Rivet denies each and every allegation contained in Paragraph 9 of the Complaint except admits that 3 shares of common stock of Rivet are held as custodian for the son of John A. Morrissey.

10. Defendant John H. Tonn owns 26,815 shares of Chicago Rivet common stock.

ANSWER:

10. Rivet admits the allegations contained in Paragraph 10 of the Complaint.

11. Defendant Thomas P. Ward owns 5,245 shares of Chicago Rivet common stock which include 3,795 shares owned by his wife, 1,350 shares owned jointly with his wife, and 100 shares held as custodian for his daughter.

ANSWER:

11. Rivet admits the allegations contained in Paragraph 11 of the Complaint.

12. Defendant Paul M. Wade owns 3,089 shares of Chicago Rivet common stock which includes 1,400 shares owned by him as trustee under self-declaration of trust in which he is the primary beneficiary, 1,909 shares held in trusts of which he is a co-trustee, and 500 shares owned by a corporation in which he has a controlling interest. Paul M. Wade is a co-trustee of the Chicago Rivet & Machine Co. Employees' Trust which holds 21,600 shares of Chicago Rivet common stock.

ANSWER:

12. Rivet denies each and every allegation contained in Paragraph 12 of the Complaint except Rivet admits that Paul M. Wade owns 1,400 shares of common stock of Rivet as trustee under self-declaration of trust in which he is the primary beneficiary and that he is a co-trustee of the Rivet Employee's Trust which holds 21,600 shares of Rivet common stock.

13. Defendant Ralph W. Jindrich, the President, owns 200 shares of Chicago Rivet common stock. Ralph W. Jindrich is a co-trustee of the Chicago Rivet & Machine Co. Employees' Trust which holds 21,600 shares of Chicago Rivet common stock.

ANSWER:

13. Rivet admits the allegations contained in Paragraph 13 of the Complaint.

14. Defendant Bernard J. Hank, Jr. owns 400 shares of Chicago Rivet common stock which include 200 shares owned by his wife.

ANSWER:

14. Rivet admits the allegations contained in Paragraph 14 of the Complaint.

15. The individual share ownership of the defendant officers who are not directors is presently unknown to plaintiffs.

ANSWER:

15. Rivet lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the Complaint.

16. This Court has subject matter jurisdiction of this action pursuant to Section 27 of the Exchange Act, 15 U.S.C. §78aa, pursuant to 28 U.S.C. §§1331, 1332 and 1337, as to Counts I, II and IV additionally pursuant to 42 U.S.C. §1983 as to Counts I and II and as to Count III pursuant 28 U.S.C. §1332 and the principles of pendent jurisdiction. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.

ANSWER:

16. Rivet denies each and every allegation contained in Paragraph 16 of the Complaint.

17. Venue in this district is proper pursuant to Section 27 of the Exchange Act, 15 U.S.C. §78aa, and 28 U.S.C. §1391(b), because the defendants reside or do business in this district and the acts and transactions giving rise to this claim occur here.

ANSWER:

17. Rivet denies each and every allegation contained in Paragraph 8 of the Complaint except admits that Rivet does business in this judicial district.

18. The principal business of MITE is the development, manufacture and sale of (i) industrial components, consisting of specialty fasteners and hardware products; and (ii) special products, including precision spindles, time stamps and recorders, perforators, hydraulic control devices and attachments for home sewing machines. These products are manufactured in Connecticut and Indiana by MITE, which has approximately 1,000 employees. MITE's products are sold throughout

the United States and abroad. MITE's sales for the fiscal year ended 1978 amounted to $48,202,940 resulting in net income of $4,107,502.

ANSWER:

18. Rivet lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 of the Complaint.

19. MITE's Common Stock, its Convertible Preferred Stock, Series A, and its 10% Subordinated Sinking Fund Debentures due 1997 are registered with the Securities and Exchange Commission ("SEC") pursuant to Section 12(b) of the Exchange Act. The Common Stock and the Subordinated Debentures are listed and traded on the American Stock Exchange. The Convertible Preferred Stock is traded over-the-counter. MITE is currently subject to the informational requirements of the Exchange Act and files reports and other information with the SEC relating to its business and financial statements.

ANSWER:

19. Rivet lacks knowledge or information sufficient to form a belief as to the knowledge of the allegations contained in Paragraph 19 of the Complaint.

20. MITE has approximately 2,242,787 shares of its Common Stock outstanding and approximately 5,960 recordholders of its Common Stock located in 47 states and the District of Columbia.

ANSWER:

20. Rivet lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of the Complaint.

21. MITE Holdings is a wholly-owned subsidiary of MITE whose only present business is to make a tender offer for, and hold shares of, Chicago Rivet.

ANSWER:

21. Rivet lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 21 of the Complaint.

22. The principal business of Chicago Rivet consists of (i) the development, manufacture and sale of rivets, automatic rivet-setting machines, and the parts and tooling for such machines and the leasing of such machines to customers; and (ii) the development, manufacture and sale of steel wire. These products are manufactured in Illinois, Pennsylvania and Iowa by Chicago Rivet, which has approximately 1,000 employees. Chicago Rivet's products are sold or leased throughout the United States. In 1977 Chicago Rivet's total revenue amounted to $36,486,255, resulting in net earnings of $2,447,946.

ANSWER:

22. Rivet denies each and every allegation contained in Paragraph 22 of the Complaint except admits that the principal business of Rivet consists of (i) the development, manufacture and sale of rivets, automatic rivet-setting machines, and the parts and tooling for such machines and the leasing of such machines to customers; and (ii) the development, manufacture and sale of steel wire and admits that Rivet together with certain subsidiaries manufac-

tures such products in Illinois, Pennsylvania and Iowa; that Rivet together with certain of its subsidiaries has approximately 1,000 employees, admits that Rivet's products are sold or leased throughout the United States; admits that in 1977 the total revenue of Rivet and its subsidiaries amount to $36,486,255 and net earnings of Rivet and its subsidiaries amount to $2,447,946.

23. Chicago Rivet's Common Stock is registered with the SEC pursuant to Section 12(g) of the Exchange Act and is traded on the American Stock Exchange. Chicago Rivet is currently subject to the informational requirements of the Exchange Act and files reports and other information with the SEC relating to its business, financial statements and other matters. As of September 30, 1978, Chicago Rivet had 866,264 shares of Common Stock outstanding. As of December 31, 1977, Chicago Rivet had approximately 2,259 recordholders of its Common Stock.

ANSWER:

23. Rivet admits the allegations contained in Paragraph 23 of the Complaint.

24. MITE has filed a Schedule 14D-1 with the SEC pursuant to Section 14(d)(1) of the Exchange Act and Rule 14d-1 promulgated thereunder with respect to a proposed cash tender offer by MITE Holdings for any and all shares of Chicago Rivet common stock at a price of $28 cash net to selling Chicago Rivet stockholders ("MITE's proposed tender offer"). MITE's proposed tender offer will comply with the federal legislation regulating interstate

tender offers (commonly known as the "Williams Act" amendments, 15 U.S.C. §§78m(d)-(e), 78n(d)-(e), to the Exchange Act) and the regulations promulgated thereunder. Under the Williams Act, a cash tender offer may commence immediately upon filing of a Schedule 14D-1. The offer must remain open for at least seven days. Accordingly, but for the Illinois Act and the Pennsylvania Law, MITE's proposed tender offer could have commenced immediately upon filing the Schedule 14D-1. MITE and MITE Holdings initially intended to commence the offer on January 24, 1979.

ANSWER:

24. Rivet lacks knowledge or information sufficient to form a belief as to the truth of the allegation that Mite has filed a Schedule 14D-1 as alleged in Paragraph 24 of the Complaint; and denies each and every remaining allegation in Paragraph 24 of the Complaint.

25. In 1968 Congress enacted the Williams Act amendments to the Exchange Act to regulate tender offers, which involve large interstate securities transactions and purchases of securities of corporations under the regulation of the SEC. 15 U.S.C. §§78m(d)-(e), 78n(d)-(e).

ANSWER:

25. Rivet denies each and every allegation contained in Paragraph 25 of the Complaint except admits that Congress enacted the Williams Act in 1968.

26. In enacting the Williams Act, Congress recognized that tender offers serve beneficial economic functions by, among other things, providing investors an opportunity to sell their shares at advantageous premiums over prevailing market prices.

ANSWER:

26. Rivet denies each and every allegation contained in Paragraph 26 of the Complaint.

27. The language of the Williams Act and its legislative history demonstrate the intent of Congress that, when an interstate offer is made for the shares of a public corporation, the success or failure of the offer should be left to the free and informed investment judgment of the shareholders of that corporation.

ANSWER:

27. Rivet denies each and every allegation contained in Paragraph 27 of the Complaint.

28. Senator Williams, a sponsor of the bill and Chairman of the Senate Subcommittee on Securities which recommended adoption of the Williams Act, clearly explained Congress' intention not to favor either side in a tender offer:

> "The committee has taken extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. The (Williams Act) is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case." 113 Cong. Reg. 24664 (1967).

ANSWER:

28. Rivet denies each and every allegation contained in Paragraph 28 of the Complaint.

29. Accordingly, the Williams Act is designed not to defeat or discourage tender offers but to establish evenhanded regulation which favors neither the offeror nor incumbent management of the corporation whose securities are being purchased.

ANSWER:

29. Rivet denies each and every allegation contained in Paragraph 29 of the Complaint.

30. For the protection of investors, the Williams Act requires that the offeror provide the information which Congress has judged to be material for an intelligent determination to sell their securities for a cash premium or to hold them.

ANSWER:

30. Rivet denies each and every allegation contained in Paragraph 30 of the Complaint.

31. The provisions of the Williams Act represent a comprehensive, carefully balanced, Congressional scheme which regulates the entire field of cash tender offers. No aspect of this type of securities transaction was ignored by Congress, and no part of it was left to state regulation.

ANSWER:

31. Rivet denies each and every allegation contained in Paragraph 31 of the Complaint.

COUNT I

32. Plaintiffs repeat and reallege the contents of paragraphs 1-6 and 9-31, inclusive, of this Second Amended Complaint, as if fully set forth herein.

ANSWER:

32. Rivet realleges and incorporates by reference its answers herein to Paragraphs 1-6 and 9-31 herein.

33. The Illinois Act, as amended, became effective on September 8, 1978. It was intended to regulate and does regulate interstate tender offers.

ANSWER:

33. Rivet denies each and every allegation contained in Paragraph 33 of the Complaint except admits that the Illinois Act, as amended, became effective on September 8, 1978.

34. The Illinois Act applies to any "take-over offer" for a "target company" (Illinois Act §2.09). For purposes of the Illinois Act, Chicago Rivet is a "target company" because Chicago Rivet has its principal executive office in Illinois and is organized under the laws of Illinois (Illinois Act §2.10(2)(a) and (b)). The Illinois Act, therefore, purports to regulate MITE's proposed tender offer for any and all shares of Chicago Rivet common stock.

ANSWER:

34. Rivet denies each and every allegation contained in Paragraph 34 of the Complaint except admits that Rivet has its principal executive office in Bellwood, Illinois and is organized under the laws of Illinois.

35. The Illinois Act prevented MITE's proposed tender offer from commencing on January 24, 1979 and for an indefinite time thereafter. The Illinois Act is invalid for the reasons set forth herein.

ANSWER:

35. Rivet denies each and every allegation contained in Paragraph 35 of the Complaint.

36. The Illinois Act violates the Exchange Act, including, but not limited to, Section 28, which preempts state regulation that conflicts with the provisions of the Exchange Act.

ANSWER:

36. Rivet denies each and every allegation contained in Paragraph 36 of the Complaint.

37. The Illinois Act violates the Constitution of the United States because it conflicts with, and stands as an obstacle to the accomplishment of, the objectives of Congress expressed in the Williams Act amendments to the Exchange Act and pursuant to the Supremacy Clause contained in Article IV, Clause 2, of the United States Constitution is, therefore, preempted.

ANSWER:

37. Rivet denies each and every allegation contained in Paragraph 37 of the Complaint.

38. The Illinois Act violates the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States because the Illinois Act imposes a substantial, direct and adverse burden on interstate commerce and serves no legitimate local

interest adequate to justify the clearly excessive burden on interstate commerce which it imposes.

ANSWER:

38. Rivet denies each and every allegation contained in Paragraph 38 of the Complaint.

39. The Illinois Act denies rights protected by and enforceable under 42 U.S.C. §1983.

ANSWER:

39. Rivet denies each and every allegation contained in Paragraph 39 of the Complaint.

40. The Illinois Act clearly interferes with the purposes and objectives of the Williams Act. Provisions requiring advance notice of a tender offer, requirements concerning the duration of offers, and pro-rata purchase and withdrawal provisions, among others, of the Illinois Act explicitly conflict with comparable provisions of the Williams Act and constitute obstacles to the accomplishment of objectives of the federal statute.

ANSWER:

40. Rivet denies each and every allegation contained in Paragraph 40 of the Complaint.

41. The Illinois Act contravenes the purpose and spirit of the Williams Act by upsetting the carefully balanced neutrality of the federal provisions and by providing, contrary to the Congressional scheme, substantial advantages to the target corporation to defeat or delay a tender offer and by imposing, likewise contrary to Congressional intent, substantial obstacles to the ability and right of shareholders to

accept tender offers which fully comply with federal requirements.

ANSWER:

41. Rivet denies each and every allegation contained in Paragraph 41 of the Complaint.

42. The Illinois Act as a whole and in particular provisions conflicts with the Williams Act. These provisions include among others the following:

(a) a required minimum twenty business day waiting period before a tender offer can be commenced (Illinois Act §4E), a concept explicitly rejected by Congress;

(b) a mandatory indefinite delay of a tender offer if a majority of the target company's "outside" directors or an Illinois shareholder or group of shareholders holding beneficially or of record 10% of the shares of the target company request a hearing, which must then be held (Illinois Act §7), whereas the Williams Act provides for no pre-tender offer hearings;

(c) a mandatory indefinite delay of a tender offer if the Illinois Secretary of State unilaterally orders a hearing because he determines, in his sole judgment, that such delay is necessary for the protection of Illinois shareholders of the target company (Illinois Act §7.A.), whereas the Williams Act provides for no pre-tender offer hearings;

(d) an indefinite delay of the commencement of an offer in the event a hearing is requested, pending a decision by the Illinois Secretary of State (Illinois Act §7A, C, D), whereas the Williams Act permits the offer to commence immediately.

(e) a required twenty day period for a tender offer to remain open (Illinois Act §9B), whereas the Williams Act permits a tender offer to be completed within seven days of announcement (ten days in the case of a partial offer);

(f) withdrawal rights at any time within seventeen days (Illinois Act §9C), which differs substantially from and is in conflict with the seven day provision under the Williams Act;

(g) denial of effectiveness of a proposed tender offer if, in the sole opinion of the Illinois Secretary of State, (i) the offer is "inequitable" even though federal law requires the marketplace to decide upon the fairness of the offer, or (ii) the offer fails to provide full and fair disclosure to the offerees under Illinois law, even though the offer is in compliance with federal disclosure standards (Illinois Act §7E);

(h) proration of acceptances of a partial offer for the entire period of the offer (Illinois Act §9D), whereas the Williams Act requires proration of only those acceptances made during the initial ten days of the offer;

(i) pre-tender offer disclosures (Illinois Act §4B), which cause substantial disruptions in national securities markets, a requirement which was explicitly rejected by Congress;

(j) burdensome disclosure of speculative and immaterial information (Illinois Act §4C), not required to be disclosed under the Williams Act, with the effect of further delaying a tender offer; and

(k) prohibition of tender offers which are not made to shareholders of the target company who are

residents of Illinois on the same terms as to shareholders elsewhere (Illinois Act §9A), the effect of which is that the Illinois Act competes with the Williams Act as a national system of regulation.

ANSWER:

42. Rivet denies each and every allegation contained in Paragraph 42 of the Complaint.

43. By impeding plaintiffs' §28 cash tender offer for Chicago Rivet, the Illinois Act imposes a substantial burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

ANSWER:

43. Rivet denies each and every allegation contained in Paragraph 43 of the Complaint.

44. Defendant Dixon intends to enforce the Illinois Act against plaintiffs and their representatives. Actual or threatened enforcement of the Illinois Act by the defendants, unless enjoined, will cause immediate, serious, substantial and irreparable injury to MITE and its shareholders, to MITE Holdings, and to the shareholders of Chicago Rivet in the following respects, among others:

(a) If MITE and MITE Holdings elect to forego commercial activity which is protected by the Williams Act and by the United States Constitution in order to avoid the harsh criminal and civil penalties which noncompliance with the Illinois Act would threaten to impose upon them, they will be deprived of their right under the Williams Act to make their tender offer at a premium above the

market price to shareholders of Chicago Rivet who reside throughout the United States, causing the following irreparable injury to MITE and MITE Holdings and to shareholders of CHICAGO RIVET, among others:

(i) MITE and MITE Holding will irretrievably lose the opportunity to acquire Chicago Rivet, a unique company;

(ii) MITE and MITE Holding will be prevented from injecting up to approximately $23 million in interstate commerce; and

(iii) Shareholders of Chicago Rivet residing throughout the United States, including those residing outside of Illinois, will forever lose their right to sell their Chicago Rivet shares pursuant to the tender offer at the substantial premium above market which MITE and MITE Holdings intend and wish to offer them.

(b) If MITE and MITE Holdings go forward with their tender offer notwithstanding the threat of enforcement of the Illinois Act, even though they have fully complied with the Williams Act and have made full and fair disclosure of all material facts to Chicago Rivet shareholders, MITE and MITE Holdings will suffer the following irreparable injury, among others:

(i) MITE, MITE Holdings and their representatives will be subject to criminal penalties for failure to comply with the provisions of the Illinois Act;

(ii) MITE, MITE Holdings and their representatives may be subject to arduous,

lengthy and expensive administrative proceedings in which they will be unable fully to raise or have adjudicated their claims that the Illinois Act is unconstitutional; and

(iii) MITE, MITE Holdings and their representatives will be subject to civil liabilities for their failure to comply with the unconstitutional Illinois Act.

(c) If MITE and MITE Holdings attempt to avoid the harm and irreparable injury set forth above by foregoing their rights under the Williams Act and the United States Constitution and by complying with the onerous and burdensome requirements of the Illinois Act, MITE, MITE Holdings and Chicago Rivet shareholders will nonetheless suffer the following irreparable injury, among others:

(i) MITE and MITE Holdings will be subjected to unnecessary, unreasonable and possibly indefinite delay of their proposed tender offer, necessitating the expenditure of substantial sums of money, none of which could ever be recovered;

(ii) MITE and MITE Holdings will be required to tie up substantial amounts of money for an indefinite period of time, thereby causing them to forego valuable alternative investment opportunities the monetary value of which is incalculable and unrecoverable; and

(iii) The market for securities of MITE and Chicago Rivet traded on national securities exchanges will be substantially affected and dis-

rupted in a manner which cannot be eliminated or repaired.

ANSWER:

44. Rivet lacks knowledge or information sufficient to form a belief as to the truth of the allegation that defendant Dixon intends to enforce the Illinois Act against plaintiffs and their representatives and denies each and every remaining allegation contained in Paragraph 44 of the Complaint.

45. Plaintiffs have no adequate remedy at law. Only through the exercise of this Court's equitable powers to enjoin the operation of the Illinois Act will MITE, its shareholders, MITE Holdings, Chicago Rivet's shareholders and the public be fully protected from immediate and irreparable loss and damages.

ANSWER:

45. Rivet denies each and every allegation contained in Paragraph 45 of the Complaint.

COUNT II

46. Plaintiffs repeat and reallege the contents of paragraphs 1-6 and 16-31 inclusive of this Second Amended Complaint, as if fully set forth herein.

ANSWER:

46. Rivet realleges and incorporates by reference its answers herein to Paragraphs 1-6 and 16-31 herein.

47. The Pennsylvania Law became effect March 3, 1976. It was intended to regulate and does regulate interstate tender offers.

ANSWER:

47. Rivet denies each and every allegation contained in Paragraph 47 of the Complaint except admits that the Pennsylvania Law became effective on March 3, 1976.

48. The Pennsylvania Act applies to any "takeover offer" for a "target company" (Pennsylvania Law §3). To qualify as a "target company" for purposes of the Pennsylvania Law, a corporation (1) must be organized under the laws of Pennsylvania *or* (2) must have its principal place of business *and* substantial assets located in Pennsylvania (Pennsylvania Law §3).

ANSWER:

48. Rivet denies each and every allegation contained in Paragraph 48 of the Complaint.

49. On Monday, January 22, 1979, Chicago Rivet brought suit in the Court of Common Pleas of Blair County, Pennsylvania, Civil Division — Equity, No. 3203 seeking to invoke the Pennsylvania Law against MITE, MITE Holdings, their officers and directors, Wertheim & Co., Inc., and Wertheim & Co. in connection with MITE's proposed tender offer.

ANSWER:

49. Rivet denies each and every allegation contained in Paragraph 49 of the Complaint except admits that on Monday, January 22, 1979, Rivet brought suit in the Court of Common Pleas of Blair County, Pennsylvania, Civil Division — Equity No. 3203 against Mite, Mite Holdings, certain offi-

cers and/or directors of Mite and/or Mite Holdings Wertheim & Co., Inc. and Wertheim & Co.

50. On Monday, January 22, 1979, Judge Eugene J. Ianuzzi of the Court of Common Pleas of Blair County, Pennsylvania issued an *ex parte* order preliminary enjoining MITE, MITE Holdings, their officers and directors, Wertheim & Co., Inc., and Wertheim & Co. from, among other things, acquiring or attempting to acquire any common stock of Chicago Rivet or making any tender offer involving the common stock of Chicago Rivet.

ANSWER:

50. Rivet denies each and every allegation contained in Paragraph 50 of the Complaint and further states that the alleged order speaks for itself.

51. On Monday, January 22, 1979, Chicago Rivet filed a Complaint with the Pennsylvania Securities Commission seeking to invoke the Pennsylvania Law against MITE and MITE Holdings and their officers and directors in connection with MITE's proposed tender offer.

ANSWER:

51. Rivet denies each and every allegation contained in Paragraph 51 of the Complaint except admits that on Monday, January 22, 1979, Rivet filed a Complaint with the Pennsylvania Securities Commission, which Complaint speaks for itself.

52. The Pennsylvania Law, if applicable, would have prevented MITE's proposed tender offer from commencing on January 24, 1979 and for an indefinite time thereafter. The Pennsylvania Act is invalid for the reasons set forth herein.

ANSWER:

52. Rivet denies each and every allegation contained in Paragraph 52 of the Complaint.

53. The Pennsylvania Law violates the Exchange Act, including, but not limited to, Section 2B thereof, which preempts state regulation that conflicts with the provisions of the Exchange Act.

ANSWER:

53. Rivet denies each and every allegation contained in Paragraph 53 of the Complaint.

54. The Pennsylvania Law violates the Constitution of the United States because it conflicts with, and stands as an obstacle to the accomplishment of, the objectives of Congress expressed in the Williams Act amendments to the Exchange Act and pursuant to the Supremacy Clause contained in Article IV, Clause 2, of the United States Constitution is, therefore, preempted.

ANSWER:

54. Rivet denies each and every allegation contained in Paragraph 54 of the Complaint.

55. The Pennsylvania Law violates the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States because the Pennsylvania Law imposes a substantial, direct and adverse burden on interstate commerce and serves no legitimate local interest adequate to justify the clearly excessive burden on interstate commerce which it imposes.

ANSWER:

55. Rivet denies each and every allegation contained in Paragraph 55 of the Complaint.

56. The Pennsylvania Law denies rights protected by and enforceable under 42 U.S.C. §1983.

ANSWER:

56. Rivet denies each and every allegation contained in Paragraph 56 of the Complaint.

57. The Pennsylvania Law contravenes the purpose and spirit of the Williams Act by upsetting the carefully balanced neutrality of the federal provisions and by providing, contrary to the Congressional scheme, substantial advantages to the target corporation to defeat or delay a tender offer and by imposing, likewise contrary to Congressional intent, substantial obstacles to the ability and right of shareholders to accept tender offers which fully comply with federal requirements, all of which constitute obstacles to the accomplishments of objectives of the federal statute.

ANSWER:

57. Rivet denies each and every allegation contained in Paragraph 57 of the Complaint.

58. The Pennsylvania Law as a whole and in particular provisions conflicts with the Williams Act. These provisions include among others the following:

(a) a required minimum twenty day waiting period before a tender offer can be commenced (Pennsylvania Law §4(a)), a concept explicitly rejected by Congress;

(b) indefinite delay of a tender offer by hearings which may be commenced by the Pennsylvania Securities Commission on its own initiative or at the request of a target company (Pennsylvania Law §4(d)), whereas the Williams Act provides for no pre-tender offer hearings;

(c) a mandatory indefinite delay of a tender offer if the Pennsylvania Securities Commission summarily determines that the takeover offer fails to provide full and fair disclosure to offerees of all material information (Pennsylvania Law §4(c)), even though the offer is in full compliance with federal disclosure standards;

(d) burdensome disclosure of speculative and immaterial information (Pennsylvania Law §5) not required to be disclosed under the Williams Act, with the effect of further delaying a tender offer; and

(e) adopting a "fiduciary" approach to other regulation of interstate tender offers in conflict with the "market" approach adopted by Congress, exemplified, for example, by the provision which exempts from coverage of the statute tender offers approved by the incumbent board of directors (Pennsylvania Law §8(a)).

ANSWER:

58. Rivet denies each and every allegation contained in Paragraph 58 of the Complaint.

59. By impeding plaintiffs' $28 cash tender offer for Chicago Rivet, the Pennsylvania Law imposes a substantial burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

ANSWER:

59. Rivet denies each and every allegation contained in Paragraph 59 of the Complaint.

60. Defendant Chicago Rivet has invoked and continues to invoke the Pennsylvania Law against plaintiffs and their representatives, causing immediate, serious, substantial and irreparable injury to MITE and its shareholders, to MITE Holdings, and to the shareholders of Chicago Rivet in the following respects, among others:

(a) If MITE and MITE Holdings elect to forego commercial activity which is protected by the Williams Act and by the United States Constitution in order to avoid the harsh criminal and civil penalties which noncompliance with the Pennsylvania Law would threaten to impose upon them, they will be deprived of their right under the Williams Act to make their tender offer at a premium above the market price to shareholders of Chicago Rivet who reside throughout the United States, causing the following irreparable injury to MITE and MITE Holdings and to shareholders of Chicago Rivet, among others:

(i) MITE and MITE Holdings will irretrievably lose the opportunity to acquire Chicago Rivet, a unique company;

(ii) MITE and MITE Holdings will be prevented from injecting up to approximately $23 million in interstate commerce; and

(iii) Shareholders of Chicago Rivet residing throughout the United States, including those re-

siding outside of Pennsylvania, will forever lose their right to sell their Chicago Rivet shares pursuant to the tender offer at the substantial premium above market which MITE and MITE Holdings intend and wish to offer them.

(b) If MITE and MITE Holdings go forward with their tender offer notwithstanding the threat of enforcement of the Pennsylvania Law, even though they have fully complied with the Williams Act and have made full and fair disclosure of all material facts to Chicago Rivet shareholders, MITE and MITE Holdings will suffer the following irreparable injury, among others:

(i) MITE, MITE Holdings and their representatives will be subject to criminal penalties for failure to comply with the provisions of the Pennsylvania Act;

(ii) MITE, MITE Holdings and their representatives may be subject to arduous, lengthy and expensive administrative proceedings in which they will be unable fully to raise or have adjudicated their claims that the Pennsylvania Law is unconstitutional; and

(iii) MITE, MITE Holdings and their representatives will be subject to civil liabilities for their failure to comply with the unconstitutional Pennsylvania Law.

(c) If MITE and MITE Holdings attempt to avoid the harm and irreparable injury set forth above by foregoing their rights under the Williams Act and the United States Constitution and by complying with the onerous and burdensome require-

ments of the Pennsylvania Law, MITE, MITE Holdings and Chicago Rivet shareholders will nonetheless suffer the following irreparable injury, among others:

(i) MITE and MITE Holdings will be subjected to unnecessary, unreasonable and possibly indefinite delay of their proposed tender offer, necessitating the expenditure of substantial sums of money, none of which could ever be recovered;

(ii) MITE and MITE Holdings will be required to tie up substantial amounts of money for an indefinite period of time, thereby causing them to forego valuable alternative investment opportunities the monetary value of which is incalculable and unrecoverable; and

(iii) The market for securities of MITE and Chicago Rivet traded on optional securities exchanges will be substantially affected and disrupted in a manner which cannot be eliminated or repaired.

ANSWER:

60. Rivet denies each and every allegation contained in Paragraph 60 of the Complaint.

61. Plaintiffs have no adequate remedy at law. Only through the exercise of this Court's equitable powers to enjoin the operation of the Pennsylvania Law will MITE, its shareholders, MITE Holdings, Chicago Rivet's shareholders and the public be fully protected from immediate and irreparable loss and damages.

ANSWER:

61. Rivet denies each and every allegation contained in Paragraph 61 of the Complaint.

COUNT III

62. This count is brought individually and derivatively by plaintiff MITE on behalf of Chicago Rivet & Machine Co. against the director-officer defendants.

ANSWER:

62. Rivet admits that Mite purports to bring this count individually and derivatively on behalf of Rivet and denies each and every remaining allegation contained in Paragraph 62 of the Complaint.

63. Plaintiff realleges paragraph 3 through 5 and 6 through 23. MITE was a shareholder of Chicago Rivet prior to the time of the transactions complained of, and has been such a shareholder continuously to the present. MITE presently owns beneficially 23,800 shares of Chicago Rivet common stock.

ANSWER:

63. Rivet realleges and incorporates by reference its answers herein to Paragraphs 3-5 and 6-23 herein and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 63 of the Complaint.

64. No demand has been made by MITE upon Chicago Rivet or its board of directors to institute and prosecute an action against the defendants named in this Count III for the acts and transactions

herein complained of, for the reason that all the present officers and directors of Chicago Rivet are named as defendants herein and are responsible for the acts, transactions and delinquencies herein complained of. No action could be or would be permitted to be instituted by Chicago Rivet without the consent of its directors and demand upon them would be entirely useless and futile. Chicago Rivet's board of directors could not and would not diligently prosecute this action, because by doing so the directors would, in effect, be suing themselves.

ANSWER:

64. Rivet admits that no demand has been made by Mite upon Rivet or its board of directors to institute and prosecute an action against defendants named in Count III of the Complaint for the acts and transactions therein complained of and Rivet denies each and every remaining allegation contained in Paragraph 64 of the Complaint.

65. No demand has been made by MITE upon the shareholders of Chicago Rivet to bring this action because to do so would be useless and futile. The transactions complained of herein are illegal, null and void and cannot be ratified by less than the unanimous consent of the stockholders.

ANSWER:

65. Rivet denies each and every allegation contained in Paragraph 65 of the Complaint.

66. This is not a collusive action to confer upon a court of the United States jurisdiction of an action which it would not otherwise have.

ANSWER:

66. Rivet admits the allegations contained in Paragraph 66 of the Complaint.

67. The directors and executive officers of Chicago Rivet collectively own a total of 101,904 shares of Chicago Rivet common stock, including 21,600 shares held by an employees trust of which certain director-officer defendants are trustees. Thus, these directors and officers personally own approximately 80,304 shares or approximately 9.3% of all outstanding Chicago Rivet shares.

ANSWER:

67. Rivet denies each and every allegation contained in Paragraph 67 of the Complaint.

68. On February 5, 1979, defendant Chicago Rivet made an offer to purchase up to at least 350,000 shares of its own common stock for cash at $30 net per share (the "Chicago Rivet offer"). The offer will expire at 4:00 p.m. C.S.T February 14, 1979, 15 hours prior to the expiration of the MITE offer. These shares will be placed in the treasury and will cease to be outstanding. The Chicago Rivet offer is attached as Exhibit I to this Second Amended Complaint.

ANSWER:

68. Rivet admits that on February 5, 1979 it made an offer to purchase up to 350,000 shares of its own common stock for cash at $30 net per share and that the shares so purchased will be placed in treasury and will cease to be outstanding, admits that a document which is titled "Offer to Purchase

350,000 Shares of its Common Stock par value $2.00 per share, by Chicago Rivet & Machine Co. for cash at $30.00 Net Per Share" ("Rivet Offer") appears to be attached as Exhibit 1 to the Complaint and denies each and every remaining allegation contained in Paragraph 68 of the Complaint.

69. The Chicago Rivet offer states that holders of 285,000 Chicago Rivet shares including all of Chicago Rivet's directors and officers have stated that they do not intend to tender their shares either to Chicago Rivet or to MITE Holdings. 285,000 shares is 32.8% of all outstanding Chicago Rivet shares. The holders of these shares other than the directors and officers are not identified in the Chicago Rivet offer and their identities are presently unknown to plaintiffs.

ANSWER:

69. Rivet denies each and every allegation contained in Paragraph 69 of the Complaint, except that Rivet is without knowledge or information sufficient to form a belief as to the truth of the allegation that the identity of the holders of these shares, other than the directors and officers, is presently unknown to plaintiff and further states that the Rivet Offer speaks for itself.

70. If the Chicago Rivet offer is consummated, the total of outstanding Chicago Rivet shares will be reduced from 866,264 to 516,264, and the group holding 285,000 shares will own approximately 55% of all outstanding Chicago Rivet shares.

ANSWER:

70. Rivet denies each and every allegation contained in Paragraph 70 of the Complaint.

71. The Chicago Rivet offer embodies a plan and conspiracy to reduce the number of outstanding shares of Chicago Rivet common stock so as to confer effective control of Chicago Rivet upon the director-officer defendants who individually own only 9.3% of Chicago Rivet's common stock and other unidentified members of their group.

ANSWER:

71. Rivet denies each and every allegation contained in Paragraph 71 of the Complaint.

72. The Chicago Rivet offer states that it will reduce the book value per share of Chicago Rivet stock from $24.06 per share to $19.85 per share.

ANSWER:

72. Rivet denies each and every allegation contained in Paragraph 72 of the Complaint.

73. The Chicago Rivet offer states:

"This offer is being made despite the belief of the Board of Directors that the price is inadequate, because of a desire to permit shareholders who wish to sell their stock to do so at a higher price and without selling to MITE Holdings, Inc." (Ex. 1, cover page)

"To the extent that shares of Stock are purchased pursuant to the Offer, there may be fewer outstanding shares of Stock remaining in the hands of shareholders willing to tender pursuant

to an offer by MITE or another offeror (if any). As a result, the Offer may also have the effect of discouraging MITE or other possible offerors (if any) from making an offer to purchase shares of Stock, whether for greater or for lesser consideration than that offered herein." (Ex. 1, p. 7.)

ANSWER:

73. Rivet denies each and every allegation contained in Paragraph 73 of the Complaint and further answering states that the Rivet Offer speaks for itself.

74. The Chicago Rivet offer falsely states that MITE has indicated that if it acquires control it may change Chicago Rivet's business policies and that MITE has not disclosed changes in business policy which it intends. That offer also contains a statement that MITE has refused to respond to a request for information. This statement in context conveys the false impression that MITE refused to respond to a request for information concerning its intentions concerning changes in Chicago Rivet's business policy or corporate structure when no such request was ever made of MITE by Chicago Rivet.

ANSWER:

74. Rivet denies each and every allegation contained in Paragraph 74 of the Complaint.

75. The Chicago Rivet offer is in violation of the director-officer defendants' fiduciary duties and constitutes waste and mismanagement of corporate assets and improper expenditure of corporate funds for, among others, the following reasons:

a. The offer has no valid corporate purpose.

b. The offer reduces book value per share.

c. The offer transfers share control of Chicago Rivet to the director-officer defendants and their group without any personal expenditure by these defendants or their group.

d. The offer threatens to deprive the remaining holders of 221,000 Chicago Rivet shares of the benefits of the MITE offer, which is made for any and all Chicago Rivet shares.

e. Defendant directors and each of them authorized the Chicago Rivet offer despite a conflict of interest which should have prevented them from approving expenditure of corporate funds to transfer share control to them and their group for no consideration.

f. The offer is a strategem designed to discourage and prevent the MITE offer;

g. The defendant directors recommended against any shareholder tendering his shares pursuant to the Chicago Rivet offer, thereby (i) estopping the directors from claiming a valid purpose for that offer and (ii) confirming its manipulative and illegal intent;

h. The mere announcement of the Chicago Rivet offer was designed to impede, and will, if permitted to continue, have the effect of impeding the consummation of the MITE cash offer at $28 per share, with the purpose of perpetuating the director-officer defendants in control and depriving the other Chicago Rivet shareholders of the benefits of the MITE offer.

ANSWER:

75. Rivet denies each and every allegation contained in Paragraph 75 of the Complaint.

76. The director-officer defendants' other activities to resist, delay and defeat MITE's tender offer for no proper purpose as alleged hereinabove also constitute a breach of fiduciary duty, waste and mismanagement of corporate assets and improper expenditure of corporate funds, for which these defendants should account.

ANSWER:

76. Rivet denies each and every allegation contained in Paragraph 76 of the Complaint.

77. Chicago Rivet's offer will cause further immediate, serious, substantial and irreparable injury to Chicago Rivet and its shareholders by depriving them of the benefits of the MITE offer. These benefits cannot be measured in damages. There is no adequate remedy at law.

ANSWER:

77. Rivet denies each and every allegation contained in Paragraph 76 of the Complaint.

COUNT IV

78. This Count IV is brought by plaintiffs MITE Corporation and MITE Holdings, Inc. against all defendants except Dixon.

ANSWER:

78. Rivet admits that plaintiffs purport to bring Count IV against all defendants except Dixon and

denies each and every remaining allegation contained in Paragraph 78 of the Complaint.

79. Plaintiffs reallege paragraphs 63 and 67 through 77 of Count III.

ANSWER:

79. Rivet realleges and incorporates by reference its answers herein to Paragraphs 63 and 67-77 of the Complaint.

80. Chicago Rivet's offer contains untrue statements of material fact and omits to state material facts necessary to make statements made therein, in light of the circumstances in which they were made, not misleading, in violation of Section 14(e) of the Exchange Act, in among others, the following respects:

a. The offer fails to disclose the identity of the holders of 285,000 shares of Chicago Rivet stock other than officers or directors holding 101,904 shares who together with the officers and directors have stated their intention not to tender their shares.

b. The offer fails to state that upon successful completion of the offer, the 285,000 share group will own approximately 55% of Chicago Rivet's stock and will effectively control Chicago Rivet.

c. The offer fails to disclose the plans, purposes, agreements, consideration, or any other matters concerning the intentions of the 285,000 share group.

d. The offer falsely conveys the impression that the directors urge shareholders not to tender to

Chicago Rivet while at the same time brokers and dealers nationwide are offered a 30 cent per share solicitation fee.

e. The offer falsely states that MITE failed to disclose its intentions concerning the business plans and corporate structure of Chicago Rivet.

f. The offer fails to state that the information request to which MITE declined to respond had no relation to its intentions concerning Chicago Rivet's business or corporate structure.

ANSWER:

80. Rivet denies each and every allegation contained in Paragraph 80 of the Complaint.

81. The Chicago Rivet offer is a fraudulent, deceptive and manipulative practice in connection with the MITE offer and with solicitation against the MITE offer in violation of Section 14(e) of the Exchange Act, in among others the following respects:

a. The offer fraudulently and deceptively conveys the impression that the MITE offer is inadequate.

b. The offer uses corporate funds to establish a bidding contest for Chicago Rivet's shares when in fact there is no other bidder than MITE.

c. The offer, even if it is never consummated, poisons the market for the MITE offer when in fact there is no viable alternative bidder than MITE for Chicago Rivet's stock.

d. The offer uses corporate funds to convey share control to the 285,000 share group while preventing the proper operation of an auction market for Chicago Rivet's stock.

e. The offer's excess shares provision (Ex. 1, p. 5) is an inherently fraudulent inducement to tender because MITE may withdraw its offer after the Chicago Rivet offer is closed and because in any event the 15 hours between the closing of the two offers is insufficient time to complete the tender to MITE.

ANSWER:

81. Rivet denies each and every allegation contained in Paragraph 81 of the Complaint.

82. MITE will be seriously, substantially and irreparably injured by the Chicago Rivet offer. MITE has no adequate remedy at law.

ANSWER:

82. Rivet denies each and every allegation contained in Paragraph 82 of the Complaint.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Rivet has not engaged — nor even threatened — any act which could constitute "state action" as required by 42 U.S.C. §1983.

THIRD DEFENSE

Plaintiffs — by flagrantly stating that they will not comply with any provision of the Illinois Act — have failed to exhaust their readily available administrative remedies.

FOURTH DEFENSE

The Pennsylvania Securities Commission is an indispensable party but has not been joined in the action.

FIFTH DEFENSE

Plaintiffs have no standing to bring a derivative action against Rivet because of their conflict of interest with other Rivet shareholders.

SIXTH DEFENSE

Plaintiffs, as a tender offeror, have no standing to bring an action under Section 14(e) of the Securities Exchange Act of 1934.

SEVENTH DEFENSE

Plaintiffs fail to state a cause of action for injunctive relief in Counts III and IV since they have an adequate remedy at law.

WHEREFORE, Rivet prays that this Court enter an order:

A. Granting judgment in its favor and against Plaintiffs dismissing the Second Amended Complaint;

B. Awarding Rivet its costs and reasonable attorneys' fees incurred herein; and

C. Granting such other relief as the Court may deem appropriate.

Duane C. Quaini
Lawrence R. Samuels
Robert H. King, Jr.

By _____
One of the Attorneys for
Defendant, Chicago Rivet
& Machine Co.

Of Counsel:

SONNENSCHEIN CARLIN NATH
& ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

Dated: February 9, 1979

VERIFICATION

Ralph W. Jindrich, on oath, states that he is Chairman of the Board of Directors and President of Chicago Rivet & Machine Co., that he has read the Foregoing Answer to Second Amended Complaint and that the Answer is true and correct to the best of his knowledge, information and belief.

/s/ Ralph W. Jindrich

Subscribed and sworn
to before me this 8th
day of February, 1979.

/s/ Helen Eagle
Notary Public

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MITE CORPORATION and
MITE HOLDINGS, INC.,

Plaintiffs,

No. 79 C 200

v.

ALAN J. DIXON and CHICAGO
RIVET & MACHINE CO.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable JOHN POWERS CROWLEY, one of the judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, January 22, 1979, at 10:00 a.m.

PRESENT:

MR. CHESTER T. KAMIN
MR. RONALD L. MARMER
MR. RICHARD HULBERT
on behalf of Plaintiffs;

MR. WILLIAM SHAPIRO,
Assistant Attorney General of the State of Illinois,
on behalf of Defendant Dixon;

MR. DUANE QUAINI and
MR. LARRY SAMUELS,
on behalf of Defendant Chicago Rivet.

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[page 5]

MR. QUAINI: I would like to advise the Court of other litigation which has been commenced this morning in connection with this tender offer.

THE COURT: All right.

MR. QUAINI: By the defendant, Chicago Rivet.

An action was filed this morning, your [page 6] Honor, in the Court of Common Pleas of Blair County, Pennsylvania, which is located in Hollidaysburg, Pennsylvania, right outside of Altoona, by Chicago Rivet v. Mite Corporation, Mite Holdings, Inc., its officers and directors of both companies and Wertheim & Co., and Wertheim & Co., Inc. Your Honor, that —

THE COURT: Who are Wertheim & Co.?

MR. QUAINI: Wertheim & Co., Inc., is the dealer-manager of the proposed offer. Wertheim & Co., is a partnership which owns the stock of Wertheim & Co., Inc.

THE COURT: O.K.

MR. QUAINI: Your Honor, that action sought a temporary restraining order, or what is a Pennsylvania version of a temporary restraining order, preventing the tender offer from proceeding until compliance is had with the Pennsylvania Business Take-Over Act and the Pennsylvania securities laws, both of which it is alleged Mite et al. have violated, and a temporary restraining order was, in fact, entered, your Honor, this morning prohibiting the tender offer from proceeding. The entry of that order was at approximately 8:45 a.m., Chicago time. A hearing was set on a

preliminary injunction for this Friday at 9:00 a.m., before the Court. A bond was set in the a mount of $3,000 and I believe, your [page 7] Honor, that bond has been posted by now. It was in the process of being posted when I was walking over to court.

We immediately contacted plaintiffs' counsel and have supplied them with a copy of those papers.

There is a second piece of litigation which has been instituted this morning and that is before the Pennsylvania Securities Commission, which has jurisdiction over the Take-Over statute in Pennsylvania and over the securities law of Pennsylvania. A complaint was filed by Chicago Rivet against Mite Corporation, Mite Holdings, Inc., and its officers and directors, or the officers and directors of both corporations, alleging that, again, that the provisions of the Pennsylvania Take-Over Act and the Pennsylvania Securities laws are being violated by Mite's conduct in this matter and seeking to have the Pennsylvania Securities Commission assert jurisdiction over the matter, take appropriate action, including seeking an injunction in the Commonwealth Court in Harrisburg, Pennsylvania, to bar further proceedings on this tender offer pending compliance by Mite with the applicable provisions of the Pennsylvania Act.

It is my understanding, your Honor, from Pennsylvania counsel that that action was filed or [page 8] was about to be filed at about 9:00 o'clock or 9:15 a.m., again Chicago time, this morning.

I have also furnished counsel for the plaintiffs with the copies that we have.

I might say, your Honor, that with regard to the matter in the Court of Common Pleas in which the temporary restraining order was entered this morning, I have served upon counsel a conformed copy of the order itself, filled in by us via telephone communications with our attorneys in Blair County.

Your Honor, I have copies of all of those papers for the Court should the Court want to review them.

THE COURT: All right, I would sure like to see them.

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[page 12]

THE COURT: Let me ask Mr. Shapiro, what is Mr. Dixon's position?

MR. SHAPIRO: Well, your Honor, as of Friday the Secretary of State had made no decision whatsoever as far as taking any action. It was the first time that they were apprised and that was via a telephone call from Mr. Kamin to Mr. Ring in the Securities office. I had various conversations with him on Friday and it was the decision at that time to make no decision until we have had a chance to examine the papers, and in light of the fact that there is a proceeding in Pennsylvania, I think that the Secretary of State would make the decision not to assume jurisdiction.

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APPENDIX H

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MITE CORPORATION and
MITE HOLDINGS, INC.,

Plaintiffs,

v. No. 79 C 200

ALAN J. DIXON and CHICAGO
RIVET & MACHINE CO.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable JOHN POWERS CROWLEY, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, January 23, 1979, at 9:30 a.m.

PRESENT:

MR. CHESTER T. KAMIN
MR. RONALD L. MARMER
MR. RICHARD HULBERT

MR. WILLIAM SHAPIRO

MR. DUANE QUAINI
MR. LAWRENCE SAMUELS.

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[page 2]

THE COURT: Let me find out first, let's find out the No. 1 question, and it is not necessarily dispositive, but what is the position of the Secretary of State?

MR. SHAPIRO: The position of the Secretary of State is this, your Honor, we do not believe that the comity provision will apply in this matter because although Pennsylvania has a valid statutory protection for Illinois offerees, as to disclosure provisions, the provisions dealing with the length of the time the offer must remain open, the pro rata portion of their Act and also the right of withdrawal is substantially [page 3] different than our Act and therefore it was the decision of the Secretary of State not to defer to Pennsylvania on that regard.

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[page 11]

MR. SHAPIRO: We will agree, your Honor, that we won't file any action in the Circuit Court of Cook County without giving Mr. Kamin adequate opportunity to come before your Honor.

THE COURT: There was another proviso, advising me before your file —

MR. SHAPIRO: We will advise you also.

THE COURT: O.K., so we have got, in effect, a status quo order by both defendants.

Now, let me ask you, before you state your position, Mr. Kamin, as I understood from your papers that were filed last night, you are going to file a — when I say "you" obviously I am talking about your client — is going to file a petition for removal?

MR. KAMIN: That is correct, it has been filed.

THE COURT: Based upon diversity.

MR. KAMIN: It has been filed this morning in the Federal Court.

THE COURT: O.K.

MR. KAMIN: And they are trying to find Hollidaysburg, Pennsylvania, and within a few minutes it will be filed out there.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MITE CORPORATION and
MITE HOLDINGS, INC.,

Plaintiffs,

v. No. 79 C 200

ALAN J. DIXON and CHICAGO
RIVET & MACHINE CO.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable JOHN POWERS CROWLEY, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, February 2, 1979, at 10:20 a.m.

PRESENT:

MR. CHESTER T. KAMIN
MR. RICHARD HULBERT
on behalf of Plaintiffs;

MR. WILLIAM SHAPIRO,
Assistant Attorney General of the State of Illinois,
on behalf of Defendant Dixon;

MR. DUANE QUAINI and

MR. LARRY SAMUELS,
on behalf of Defendant Chicago Rivet.

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THE CLERK: 79 C 200, Mite V. Dixon, second amended motion for temporary restraining order and preliminary injunction.

THE COURT: O.K.

MR. KAMIN: Good morning, your Honor.

THE COURT: What happened in Pittsburgh?

MR. QUAINI: Good morning, your Honor.

MR. KAMIN: Well, we tried to, as you know, put this case on the back burner —

THE COURT: Right.

MR. KAMIN: — and the Pennsylvania Securities Commission didn't think the Pennsylvania statute applied and Judge Snyder said that he thought that disposed of the matter.

THE COURT: Right, it made it moot there. O.K.

MR. KAMIN: So we now have the letter from the Secretary to me on behalf of Mite, which I have attached to the motion.

THE COURT: Right. I received a copy of it.

MR. KAMIN: This was pursuant to the status quo order that was entered on the 24th, and we received this late yesterday afternoon and filed our second amended motion attaching it and placing it before the Court.

Under this notice, if I understand it correctly, a cease and desist order has been issued.

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[page 3]

THE COURT: Which will not take effect —

MR. KAMIN: Which will not be served until the 5th.

THE COURT: Until the 5th of February.

MR. KAMIN: Which is a Monday, so that we are certainly at issue now in this case.

THE COURT: And as I see it, the reason for the cease and desist order as set forth in the notice of the Secretary of State is that Mite has not registered this tender offer with the Secretary as required under the Act.

MR. SHAPIRO: That is correct.

THE COURT: O.K.

MR. SHAPIRO: Your Honor, as a preliminary matter, I would like to ask leave of court to adopt the answer of Chicago Rivet to the First Amended Complaint as the Answer of the Secretary of State to the First Amended Complaint.

THE COURT: O.K.

MR. QUAINI: Your Honor, may I —

MR. KAMIN: Can I just say one other thing?

THE COURT: Sure.

MR. KAMIN: The motion, since we have not received any notice from Chicago Rivet that they are seeking any action, although they indicate in the memo that we got this morning that they feel that they might do that, we [page 4] have only moved with respect to the Secretary —

THE COURT: Right.

MR. KAMIN: — and the only relief that we are seeking is against the Secretary.

THE COURT: Right.

MR. QUAINI: Your Honor, may I try to outline the position of Chicago Rivet?

THE COURT: Sure.

MR. QUAINI: First of all, with regard to the Pennsylvania proceedings that Mr. Kamin discussed, while the Securities Commission has ruled as he indicated and while the judge in the Western District also has ruled as indicated, the matter is currently pending before the Commonwealth Court

of Pennsylvania, which is the appropriate appellate court for appeals from decisions of administrative agencies in Pennsylvania, and it is my understanding from Pittsburgh counsel, your Honor, that a hearing has been set on Monday morning at 11:00 a.m. before the Commonwealth Court or a judge thereof with regard to a motion that was filed on our behalf seeking an injunction pending appeal in Pennsylvania on the jurisdictional issue decided, in our view, obviously, improperly by the Securities Commission.

I wanted to update the Court on that, so there is a proceeding still pending in Pennsylvania, [page 5] beyond which, your honor, with regard to the matter before the Court, it is in fact true that I have not served any notice of an intention to bring any action under the Illinois statute. However, in light of the notice that I also received yesterday afternoon from the Secretary of State, I am certainly not before the Court taking the position that there is no case or controversy with regard to my client, because my client's involvement in the action —

THE COURT: Is going to be affected?

MR. QUAINI: —is going to be affected, and my serving a notice of my intention to take action, in my judgment, would be merely superfluous at this point. If a cease and desist order is going to be issued or has been issued pending effectiveness on Monday, then that obviously involves my client.

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[page 14]

THE COURT: Tuesday the 13th? O.K.

Well, I have before me — you know, this is somewhat out of order, but I agree with you, Mr. Quaini, for sure that any litigation expenses, of course, are not irreparable injury. The Supreme Court has told us that very clearly.

But I look upon this as an application for a temporary

restraining order which, of course, since it is an extraordinary relief, I can take it on the affidavits and I have to also take a look at the time questions that are involved in this case, but before, of course, I can grant a temporary restraining order there are really three determinations that I have to make, whether there exists, one, an adequate remedy at law; two, whether the plaintiff has a likelihood of success on the merits; and, three, the issue that you had raised most vociferously whether without such an order the plaintiff would suffer irreparable injury. And in making that determination, of course, I have to keep in mind that any injunction, especially a temporary restraining order, is extraordinary relief and should be granted only upon a clear showing by the plaintiff.

As to the first element, it is clear that [page 15] Mite has no adequate remedy at law. Certainly since Piper v. Criss-Craft at 430 U.S. 1, it appears that the only viable remedy in a tender offer situation is injunctive relief rather than an action for damages. If Mite is unsuccessful in its tender offer, it will be unable to recoup any damages sustained. Furthermore, inasmuch as Mite's primary concern at this juncture is delay to their tender offer, available administrative remedies which are both time-consuming and speculative don't provide a viable alternative to injunctive relief.

Secondly, I find that Mite has made a sufficient showing of likelihood of success on the merits, and this is one, really, an analysis purely on the law, and when I take — of course, in making that determination I rely heavily on Judge Wisdom's very scholarly and extensive analysis in the Great Western United Corporation v. Kidwell case, 577 F. 2d 1256. I realize the Supreme Court has granted probable jurisdiction in that case, or has noted probable jurisdiction.

I also have to, and although I realize this is certainly not res judicata or any other approval on the merits, I have to take a look at the history of the Uarco case in deciding whether in

fact in my judgment Judge Wisdom's opinion in Kidwell is going to be ultimately sustained, and the action, of course, the Court of Appeals [page 16] in the Uarco case did not reach the merits of the issue, but I also have to take note that Mr. Justice Stevens denied any further stay of the order, and Mr. Justice Stevens, of course, was a member of the court that noted probable jurisdiction in Great Western United v. Kidwell. I realize fully that that has absolutely no precedential value, but it is something that must be considered. It may be or it may not be an inclination at least by one Justice of the court as to his views of Judge Wisdom's opinion.

There is no question, however, that not every provision of the Illinois Act may be constitutionally defective and, further, not all those provisions which allegedly do conflict with Federal law will necessarily affect this particular tender offer. However, I think there is sufficient disparity between certain principal sections of the Williams Act and the Illinois Act which unquestionably touch this tender offer, and it compels a finding, to me, that there is a substantial likelihood of success on the merits.

Really of prime concern to me is the question of delay. Under the Illinois Act, unless accelerated by the Secretary, there is a 20-day waiting period between when a registration statement is filed and when the tender offer becomes registered. Further, [page 17] a pre-offer hearing may be called within the discretion of the Secretary within 20 days of registration, or if requested by a majority of directors of the target company, giving the target company control over the offer under the Illinois Act, I find within 15 days of registration. The hearing will ordinarily be held within ten days of the notice of request, but it may be continued by the Secretary. As I view the Act, if the majority of the directors of the target company request a hearing, the Secretary has to grant the hearing. He doesn't have the discretion and, therefore, puts

the enforcement of the Act and the delay provisions of the Act into the hands of the target company, providing them with an unfair advantage in the market place. And then the results of the hearing, of course, must be announced within 15 business days of the conclusion of the hearing.

It is evident to me that under the statutory scheme of the Illinois Act, that the delay in a tender offer is indeterminative and could conceivably be fatal to a proposed tender offer. By contrast, the Williams Act provides for no such lengthy delay regardless of any proposals to incorporate it in the Act. They are not in the Act now.

The defendants' response, really, that any delay thus far has been the result of the plaintiffs' [page 18] deliberate refusal to comply with the Illinois Act, I think is unfounded. The potential for delay under the Illinois Act goes well beyond the three-week delay since the initiation of this action.

Also, that there was — I have taken note, too, that there was litigation pending in Pennsylvania during this period of time, and apparently there is still action pending in Pennsylvania.

Futher, I note that the Secretary, in his notice of the cease and desist order, gave as his sole basis for the order the fact that Mite has failed to register the tender offer. Nowhere in the pleadings can I find any assertion by the Secretary of what interests the Illinois law purports to protect which are not adequate protected by the Fedral law.

In the face of a constitutional challenge, I can't speculate as to the purposes of the state statute.

Finally, I find that under the circumstances of this case, the delay that will be occasioned by requiring Mite to comply with the Illinois law will result in irreparable injury. The injury, I believe, is evident from the proceedings thus far and inherent in the transaction. When this action was filed, the plaintiff proposed to begin the tender offer on the 24th of January.

Because of litigation in Pennsylvania, that date was reset to the [page 19] 5th of February. According to the notice of hearing issued by the Secretary, a hearing is set for the 5th of February. This will, of course, require that the offer be reset again, and if the majority of the Board of Directors of the target company request a hearing, that it would be a minimum of a 15-day period before that hearing could commence.

I am mindful, of course, also that the proceedings pending in Pennsylvania have caused and continue to cause more delay, and I think that the fact that Mite could lose the opportunity to acquire a company, a unique company, that that could cause irreparable injury to them.

Also I have to balance, as far as the potential for injury, obviously another thing I have to do as far as the — in granting a temporary restraining order, ruling on a temporary restraining order, is balancing the equities, and I can't balance the equities between the management of plaintiffs and the management of Chicago Rivet, but balance the equities as to the shareholders of Chicago Rivet, because they are the ones that the Williams Act is designed to protect and the Illinois Act at least facially is designed to protect, not to protect the incumbent management, although I find that the provisions of the Illinois Act do have the effect of protect- [page 20] ing incumbent management or giving incumbent management an unfair advantage in a tender offer situation. As between the shareholders of Chicago Rivet and Mite, I think that balance has been struck by the enactment of the Williams Act, and the Williams Act will balance the equities.

Therefore, I grant the motion of the plaintiff Mite against the defendant Alan Dixon for a temporary restraining order, and I enjoin the Secretary of State from enforcing the Illinois Business Take-Over statute against this tender offer, and this temporary restraining order, of course, as all temporary

restraining orders, shall be for ten days, but I will have a hearing within that ten-day period before the tender offer can become effective that is going to be issued on the 5th of February, and I will therefore schedule a hearing on a permanent injunction on the 8th of February, Thursday, the 8th of February.

O.K., now I think I am going to tell both parties, you know, there is a substantial body of law that says that when the granting of a temporary restraining order has in effect granted the relief, that it does become an appealable order, but if you wish me to style it a "preliminary injunction" so that there is no question in the Court of Appeals as to jurisdiction, I will certainly [page 21] do that, as I did in the Uarco against Daylin.

• • •

[page 26]

THE COURT: All right, so how do you want me to style the order, as a preliminary injunction?

MR. QUAINI: On behalf of my client, I think that would be advisable, your Honor, so that there is no question about its appealability.

• • •

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MITE CORPORATION and
MITE HOLDINGS, INC.,

Plaintiffs,

v. No. 79 C 200

ALAN J. DIXON and CHICAGO
RIVET & MACHINE CO.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable JOHN POWERS CROWLEY, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, February 9, 1979, at 11:00 a.m.

PRESENT:

MR. CHESTER T. KAMIN
MR. RICHARD HULBERT
on behalf of Plaintiffs;

MR. DUANE QUAINI
on behalf of Defendant Chicago Rivet;

MR. WILLIAM SHAPIRO,
Assistant Attorney General of the State of Illinois,
on behalf of Defendant Dixon.

• • •

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CLERK

No. 80-1188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES EDGAR,

Appellant,

—v.—

MITE CORPORATION and MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES EDGAR,

Appellant,

—v.—

MITE CORPORATION and MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

Appellees MITE Corporation and MITE Holdings, Inc. (collectively, "MITE") respectfully move this Court to dismiss this appeal as moot or, alternatively, to summarily affirm the judgment of the United States Court of Appeals for the Seventh Circuit below on the ground that the decision below was plainly correct and the circumstances of this case make it inappropriate for full briefing and argument.

ADDITIONAL STATEMENT OF FACTS

The Statement of the Case in the Jurisdictional Statement of the Appellant omits events subsequent to the February 5, 1979 publication by MITE of its tender offer to the stockholders of Chicago Rivet & Machine Co. ("Chicago Rivet") which have rendered this case moot. Specifically, pursuant to a written

agreement with Chicago Rivet, on February 12, 1979 MITE withdrew its tender offer prior to purchasing any Chicago Rivet stock. That agreement provided in substance that MITE would have the right to investigate the business of Chicago Rivet until March 5, 1979, and, subject to the satisfactory result of that investigation, would commence a new tender offer for Chicago Rivet's stock on or before March 12, 1979. It also provided that if MITE did not commence that new tender offer, MITE would not at any time in the future acquire or make any offer to acquire any stock or assets of Chicago Rivet or otherwise offer to acquire Chicago Rivet.

On March 2, 1979, MITE announced that, based on the results of its investigation of Chicago Rivet, MITE's Board of Directors had unanimously decided against making the new tender offer for Chicago Rivet stock. Since that date, MITE has had no interest or intention to acquire Chicago Rivet by means of a tender offer or otherwise and, as noted, is contractually prohibited from doing so.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to the statutes cited by the Appellant in the Jurisdictional Statement, Section 4(b) of the Illinois Criminal Code of 1961, Ill. Rev. Stat. 1979, ch. 38, § 4-8(b) is pertinent. That statute provides as follows:

§ 4-8. *Ignorance or Mistake*

* * * * *

(b) A person's reasonable belief that his conduct does not constitute an offense is a defense if:

(1) The offense is defined by an administrative regulation or order which is not known to him and has not been published or otherwise made reasonably available to him, and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him; or

(2) He acts in reliance upon a statute which later is determined to be invalid; or

(3) He acts in reliance upon an order or opinion of an Illinois Appellate or Supreme Court, or a United States appellate court later overruled or reversed;

(4) He acts in reliance upon an official interpretation of the statute, regulation or order defining the offense, made by a public officer or agency legally authorized to interpret such statute.

ARGUMENT

A. This Case Is Moot and the Appeal Should Be Dismissed.

The exercise of judicial power by this Court under Article III of the Constitution of course depends upon the existence of a case or controversy. To satisfy that requirement, "an actual controversy must be extant at all stages of review. . . ." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). The Court of Appeals in its decision below, noting that MITE had withdrawn its tender offer, raised the question of whether the case was moot. It concluded the case was not for two reasons: (1) the record did not indicate whether MITE intended to make another tender offer for Chicago Rivet's stock and (2) in the event it were to reverse the judgment of the District Court, MITE would face both criminal and civil liability under §§ 137.63-137.65 of the Illinois Business Take-Over Act (the "Illinois Act") for having commenced its tender offer for Chicago Rivet's stock (Appendix, p. 6A).*

The first reason advanced, apparently based upon an application of the "capable of repetition, yet evading review" doctrine enunciated by this Court, under which a case will not be considered moot where a claim abandoned in the course of a litigation "may arise again *with respect to that plaintiff*,"

* The opinion of the Court of Appeals below is reported at 633 F.2d 486.

United States Parole Comm'n v. Geraghty, 445 U.S. 388, 398 (1980) (emphasis supplied), must reflect the Court of Appeals' lack of knowledge of the facts set forth above concerning the circumstances of MITE's withdrawal of its tender offer for Chicago Rivet stock. In light of those facts, there is no prospect whatsoever of a tender offer by MITE for stock of Chicago Rivet and, accordingly, no grounds for an exception to the doctrine of mootness based on the assumption of the existence of such a prospect.

The second reason advanced by the Court of Appeals, the possibility of criminal or civil liability of MITE for having commenced its tender offer in the event the judgment of the District Court is reversed, is unsound as a matter of law because MITE would have a complete defense to any such attempted criminal prosecution

> "in the rule seldom called into question, and hence infrequently enunciated, that where a criminal statute is first declared to be unconstitutional and later held to be constitutional, a person committing the prohibited act during the interval of time between the two decisions is not liable to indictment."

Wilson v. Goodin, 291 Ky. 144, 163 S.W. 2d 309, 312 (1942). This rule is embodied in the common law, *see, e.g., United States v. Mancuso*, 139 F.2d 90, 91-92 (3d Cir. 1943), *Wilson v. Goodin, supra;* in the Model Penal Code, § 2.04(3)(b) (Proposed Official Draft (1962)); and in the criminal codes of many states, including that of Illinois which provides in pertinent part that a "person's reasonable belief that his conduct does not constitute an offense is a defense if . . . [h]e acts in reliance upon an order or opinion of . . . a United States appellate court later overruled or reversed. . . ." Illinois Rev. Stat. 1979, ch. 38, § 4-8(b). *See People v. Dean*, 73 Ill. App.3d 501, 392 N.E.2d 57 (1979) (upholding a defense based on § 4-8(b)). *See also* 21 C.J.S. *Courts* § 194(a), at 328-29 (1940); W.R. LaFave and A.W. Scott, Jr., Handbook on Criminal Law § 47, at 367 (1972). The court's reasoning in *People v. Dean, supra,*

exemplifies a liberal interpretation of § 4-8(b) and clearly suggests that reliance upon a judgment invalidating a state statute rendered by a trial court, which is subsequently affirmed by an appellate court, would suffice to establish the defense.

The defense, as defined in the Illinois statutes, exists regardless of whether the criminal defendant was a party to the civil litigation in which the statute was adjudged invalid. In addition, leading commentators have suggested that an independant and equally complete defense, based on public policy, should exist where the criminal defendant not only was the plaintiff in that civil litigation, but obtained in it (as MITE did here) an injunction against enforcement of the statute imposing criminal liability. Hall and Seligman, *Mistake of Law and Mens Rea,* 8 U. Chi. L. Rev. 641, 673-74 (1941). *Cf. People v. Dean, supra.*

Whichever theory is adopted, MITE could not be prosecuted successfully for its activities undertaken in reliance upon the judgment below. Based upon analogous reasoning, MITE likewise could not be subjected to any civil penalty for those activities. *See State ex rel. Williams v. Whitman,* 116 Fla. 196, 156 So. 705 (1934) (reversing an administrative penalty based upon a finding of violation of a statute declared unconstitutional in a decision subsequently reversed). Accordingly, this case is moot and the appeal should be dismissed.

B. In the Event the Court Concludes That This Case Is Not Moot, It Should Summarily Affirm the Judgment Below.

In the event this Court concludes that this case is not moot, MITE submits that it should summarily affirm the judgment of the Court of Appeals below because the decision below was plainly correct and the circumstances of this case make it inappropriate for full briefing and argument. That decision clearly and thoroughly discusses the merits of the constitutional questions involved and is consistent with the reasoning and result of the only other Court of Appeals decision on the

merits of the subject of constitutionality of state take-over laws, *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979). Therefore, this is not an occasion in which plenary consideration by this Court is necessary to resolve a conflict between the decisions of appellate courts.

Also of pertinence is the fact that the substance of the Federal law applicable to tender offers significantly changed subsequent to the judgment of the District Court below. On December 6, 1979, some nine months after MITE withdrew its tender offer, the Securities and Exchange Commission promulgated extensive new Rules of prospective application governing tender offers which effectively preempt inconsistent state statutes, of which the Illinois Act is one.* A decision of this case would thus not reach the important question of the validity of those new SEC Rules. Moreover, a decision sustaining the validity of those Rules would obviate a decision on the constitutional issues raised in this case. *Cf. Kennecott Corp. v. Smith*, CCH Fed. Sec. L. Rep. ¶ 97,731, at p. 98,838 (3d Cir., December 17, 1980). The Court of Appeals below properly eschewed any decision on the validity of those SEC Rules, since they are inapplicable to this case (see Appendix, pp. 23a-24a n. 25). Consistent with the principle that this Court will not pass upon constitutional issues unnecessarily or in broader terms than are required, *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582, n. 22 (1979), *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-69 (1947), plenary consideration by this Court of the validity of state take-over statutes should await presentation of the issue in the context of the validity of those SEC Rules.

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* These Rules appear at 17 C.F.R. § 240.14d-1 *et seq.* (1980).

CONCLUSION

Appellees MITE Corporation and MITE Holdings, Inc. respectfully request that this Court dismiss this appeal or, alternatively, summarily affirm the judgment below of the United States Court of Appeals for the Seventh Circuit.

Dated: February, 1981

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES EDGAR, APPELLANT

v.

MITE CORPORATION AND MITE HOLDINGS, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Illinois Business Take-Over Act is unconstitutional under the Supremacy and Commerce Clauses of the United States Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1188

JAMES EDGAR, APPELLANT

v.

MITE CORPORATION AND MITE HOLDINGS, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

This is an action seeking injunctive relief and a declaration that the Illinois Business Take-Over Act (Ill. Ann. Stat. ch. 121 1/2, § 137.51 *et seq.* (Smith-Hurd Cum. Supp. 1980)) is unconstitutional under the Supremacy and Commerce Clauses of the United States Constitution. Appellees MITE Corporation and MITE Holdings, Inc. ("MITE") filed this action in the United States District Court for the Northern District of Illinois against the Secretary of State of Illinois, who is charged with the administration and enforcement of the Illinois statute. MITE Corporation and MITE Holdings, Inc., are Delaware corporations with their principal executive offices in New Haven, Connecticut (J.S. App. 2a).

MITE filed its complaint on the same day that it commenced a cash tender offer for the shares of Chicago Rivet and Machine Company ("Chicago Rivet") by complying with Section 14(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(d). Chicago Rivet is a publicly-held Illinois corporation with its principal executive offices in Bellwood, Illinois. Chicago Rivet's shares are traded on the American Stock Exchange and are held by a total of 2,181 shareholders of record, of whom 589 (27%) are residents of Illinois (J.S. App. 2a-3a).

The Illinois statute imposed certain preconditions, beyond those prescribed in the federal securities laws, to the commencement of MITE's tender offer. These included the filing of a notice of the proposed tender offer with state officials, completion of a 20-day waiting period, and—if the Illinois Secretary of State so ordered—an adjudication of the substantive fairness of MITE's offer. MITE declined to comply with these requirements and sought, in addition to declaratory relief, an injunction prohibiting the enforcement of the Illinois statute in connection with its tender offer. The district court entered a preliminary injunction enjoining the Secretary of State from issuing a cease and desist order or notice of hearing under the Illinois statute, or from otherwise enforcing the statute against MITE.[1]

In accordance with federal law, MITE then commenced its tender offer and published notice thereof in the national edition of the Wall Street Journal. The tender offer represented a proposed transaction in interstate commerce in excess of $23 million, and extended to all shareholders of

---

[1]The Illinois Secretary of State previously had issued a Temporary Cease and Desist Order and Notice of Hearing after finding that the tender offer was within his jurisdiction and that the Illinois statute was about to be violated. He notified MITE of his intention to serve an order requiring MITE, among other things, to "cease and desist all further action to make a tender offer to security holders of the Chicago Rivet & Machine Co." (J.S. App. 36a).

Chicago Rivet residing throughout the United States (J.S. App. 5a). The tender offer price per share was $28. This represented a premium of more than $4 per share over the market price in the period immediately preceding the announcement of the offer (*id.* at 34a).

Following a hearing on MITE's motion for a permanent injunction, the district court entered a final judgment in favor of MITE (J.S. App. 32a-41a). The court declared the Illinois statute to be both preempted by the Williams Act amendments to the Securities Exchange Act of 1934[2] and an undue burden on interstate commerce. The district court therefore permanently enjoined enforcement of the Illinois statute against MITE (*id.* at 41a). The court of appeals affirmed (*id.* at 1a-31a). The court of appeals agreed that several provisions of the Illinois statute frustrated the congressional purposes underlying the Williams Act and therefore were preempted. The court also found that the Illinois statute substantially obstructed interstate commerce without being necessary to the achievement of any significant local objective, in contravention of the Commerce Clause.

ARGUMENT

The decision of the court of appeals correctly applies legal principles that this Court previously has enunciated. The United States therefore believes that the judgment below should be affirmed. Moreover, in view of the absence of any conflict among the courts of appeals and the clarity of the governing legal principles, the Court may wish to consider summary affirmance. Sup. Ct. R. 15.1(h).

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[2]The Williams Act added new Sections 13(d), 13(e), 14(d), 14(e) and 14(f) to the Securities Exchange Act of 1934. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. 78m(d)-(e) and 78n(d)-(f)).

1. The court of appeals' decision in this case is fully in accord with the only other decision of a court of appeals concerning the constitutionality of a state takeover statute as applied to a tender offer. See *Great Western United Corp.* v. *Kidwell*, 577 F. 2d 1256 (5th Cir. 1978), rev'd on venue grounds *sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979).[3] In that case, the Fifth Circuit declared unconstitutional, on both Supremacy and Commerce Clause grounds, the Idaho Corporate Takeover Law, which is similar in all relevant respects to the Illinois statute at issue in this appeal. The reasoning of the Seventh Circuit in this case is entirely consistent with that of the Fifth Circuit in *Kidwell*.

2. Recent changes in federal tender offer regulation have essentially eliminated the need for the lower courts to consider in the future one of the major issues decided by the court of appeals in this case—whether a state statute that requires public disclosure of the material terms of a tender offer, followed by a substantial waiting period before the tender offer may commence, frustrates a congressional purpose underlying the Williams Act. Pursuant to its rule-making authority under the Securities Exchange Act and the Williams Act, the Securities and Exchange Commission recently promulgated detailed rules governing the conduct of tender offers. See Securities Exchange Act Release No. 16384, 44 Fed. Reg. 70326 (1979). Rule 14d-2(b), 17 C.F.R. 240.14d-2(b), which defines the date of commencement of a

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[3] In *Kennecott Corp.* v. *Smith*, 637 F. 2d 181 (3d Cir. 1980), the Third Circuit endorsed the Seventh Circuit's reasoning in the present case and held that the district court abused its discretion by denying a preliminary injunction against the operation of a similar New Jersey takeover statute. The court found that "there is a reasonable likelihood that Kennecott will prevail in its contention that the Williams Act and the regulations preempt New Jersey's takeover rule." *Id.* at 191. On remand, the district court held that the Williams Act did in fact preempt the New Jersey statute. See note 6, *infra*.

cash tender offer, requires that a tender offeror, within five days of making a public announcement of the material terms of the offer, either begin its offer by disseminating specified information to security holders and filing the requisite documents with the Commission or announce that it is withdrawing its offer. As a validly promulgated federal regulation,[4] Rule 14d-2(b) constitutes federal law and preempts contrary state requirements (*Free* v. *Bland*, 369 U.S. 663, 668 & n.10 (1962)).

Rule 14d-2(b) stands in direct operational conflict with the provisions of state takeover laws such as the Illinois statute. The Illinois statute requires a public filing setting forth the material terms of the proposed tender offer and imposes a post-announcement waiting period prior to the effective date of the tender offer.[5] Such state requirements are in direct conflict with Rule 14d-2(b), since they forbid precisely what the federal rule requires—the prompt commencement of the tender offer once the offeror has publicly disclosed the material terms of its offer. Accordingly, federal and state courts uniformly have held that Rule 14d-2(b)

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[4]In *Canadian Pacific Enterprises (U.S.), Inc.* v. *Krouse*, [Current] Fed. Sec. L. Rep. (CCH) para. 97,863 (S.D. Ohio Jan. 13, 1981), appeal pending, No. 81-3083 (6th Cir., filed Feb. 17, 1981), the court held, in the face of a direct challenge, that Rule 14d-2(b) is a valid federal regulation.

[5]Ill. Ann. Stat. ch. 121 1/2, § 137.54.E (Smith-Hurd Cum. Supp. 1980) provides:

> A take-over offer shall become registered 20 business days after the date of filing the registration statement or an amendment thereto with the Secretary, unless accelerated by order or delayed by written notification, or unless prior thereto the Secretary calls a hearing with respect to the offer.

Ill. Ann. Stat. ch. 121 1/2, § 137.54.B (Smith-Hurd Cum. Supp. 1980) requires that a tender offeror publicly disclose the material terms of the offer on or prior to the date of filing of the registration statement.

preempts the pre-commencement filing requirements of state takeover statutes.[6]

Because the events at issue in this litigation occurred before the effective date of Rule 14d-2(b), the court of appeals did not base its decision on the new rule, although it correctly observed that Rule 14d-2(b) would "directly conflict" with the pre-commencement disclosure provisions of the Illinois statute (J.S. App. 23a-24a n.25). Instead, the court focused on the broader question " 'whether, under the circumstances of this particular case, [the pre-commencement disclosure provisions, as well as the other provisions of Illinois law at issue,] * * * stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[7] Following the effective date of Rule 14d-2(b), however, courts considering the application of state takeover statutes to tender offers have examined the direct and self-evident conflict that the Rule produces (see note 6, *supra*), rather than utilizing the more general analysis applied by the court of appeals in this case. Thus, a central issue presented in this case—the validity of a state public notice and pre-commencement waiting period requirement, examined in light of the terms and purposes of the

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[6]See *Kennecott Corp.* v. *Smith*, [Current] Fed. Sec. L. Rep. (CCH) para. 97,858 (D.N.J. Jan. 29, 1981) (New Jersey takeover statute); *Canadian Pacific Enterprises (U.S.), Inc.* v. *Krouse*, [Current] Fed. Sec. L. Rep. (CCH) para. 97,863 (S.D. Ohio Jan. 13, 1981), appeal pending, No. 81-3083 (6th Cir., filed Feb. 17, 1981) (Ohio takeover statute); *Hi-Shear Industries, Inc.* v. *Neiditz*, [Current] Fed. Sec. L. Rep. (CCH) para. 97,805 (D. Conn. Dec. 16, 1980) (Connecticut takeover statute); *Eure* v. *Grand Metropolitan Ltd.*, 80 CVS 1685 (N.C. Super. Ct. Apr. 18, 1980) (North Carolina takeover statute). See also *Sun Life Group, Inc.* v. *Standard Life Insurance Co. of Indiana*, [1980] Fed. Sec. L. Rep. (CCH) para. 97,314 (S.D. Ind. Mar. 12, 1980) (absent an interpretation of the Indiana takeover statute by the state that eliminated the direct conflict with Rule 14d-2(b), the federal rule would have preempted the Indiana statute).

[7]J.S. App. 9a, quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Williams Act and without reference to the Commission's implementing rules—will not likely arise again.[8]

3. In any event, even viewing this case apart from the Commission's new regulations, the court of appeals correctly held that the Illinois statute violates both the Supremacy and Commerce Clauses of the United States Constitution. The decision of the court below involves no more than the application of well-settled principles of constitutional law to the facts of this case. The legal principles relevant to the analysis of the Supremacy and Commerce Clause issues are discussed at length on pages 15-62 of the brief amicus curiae of the Securities and Exchange Commission in *Leroy* v. *Great Western United Corp.*, No. 78-759 (hereinafter "*Leroy* Amicus Br.").[9]

a. The Illinois statute violates the congressional policies underlying the Williams Act against pre-commencement notification, fairness review by governmental officials, and undue delay of tender offers. See *Leroy* Amicus Br. 37-62. In particular, the Illinois statute, contrary to Congress' determination, (a) empowers a state official to pass on the substantive fairness of a tender offer and to block it, despite full compliance with federal law, if, in the opinion of that state official, the offer is "inequitable"; (b) allows outside directors or a substantial security holder of the subject company to require that state hearings be held; (c) prevents the tender offer from proceeding until the state hearings

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[8]The Commission's rules do not apply to tender offers (such as the present tender offer) made prior to their effective date. J.S. App. 24a n.25. As discussed above, a federal court considering the preemption issue in the future and applying the Commission's rules as well as the Williams Act would have little choice, absent a harmonizing interpretation by the state, see note 6, *supra*, but to find a state statute (such as the Illinois statute) to be preempted.

[9]Copies of our brief amicus curiae in *Leroy* are being served on counsel to the parties herein.

have been completed; and (d) imposes a lengthy pre-notification requirement on tender offerors. See J.S. App. 22a. In light of these state-imposed impediments to federally regulated tender offers, the court of appeals correctly applied the principle that a state statute may not, consistent with the Supremacy Clause, frustrate the achievement of congressional objectives embodied in federal law. See *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile*, No. 79-1336 (Mar. 9, 1981), slip op. 5; *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Under the Illinois statute, outside directors or a substantial security holder of a subject company—and, indirectly, incumbent management (see J.S. App. 14a-15a)—may demand a hearing and thereby prevent the tender offer from going forward until the hearing is concluded. See Ill. Ann. Stat. ch. 121 1/2, § 137.57.A (Smith-Hurd Cum. Supp. 1980). The statute provides no fixed date for the completion of this adjudicatory proceeding. *Id.* at § 137.57.C-D. Such an impediment to tender offers conflicts with "Congress' judgment that delay grossly in excess of that contemplated by the Williams Act redounds to the detriment of stockholders by substantially deterring the making of tender offers." J.S. App. 20a-21a; see also *Leroy* Amicus Br. 42-62. In addition, the Illinois statute provides that, once a hearing is commenced, the Secretary of State must adjudicate, not merely the adequacy of disclosure, but the substantive fairness of the tender offer.[10] He is required to deny registration

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[10]Appellant argues (J.S. 10) that the Illinois statute does not permit the Illinois Secretary of State to adjudicate the fairness or equitableness of a tender offer, contending that the "word 'inequitable' is coupled with 'fraud' and 'deceit' and simply does not put the Secretary in the position of looking at the amount of the offer." That, however, ignores the plain text of the statute, which directs the Secretary of State to deny registration to a tender offer on the ground that it "fails to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, *or that the take-over offer is inequitable* or would work

to tender offers (even those at a premium above current market price) that are "inequitable." See Ill. Ann. Stat. ch. 121 1/2, § 137.57.E (Smith-Hurd Cum. Supp. 1980). As explained by the court of appeals, this contravenes a fundamental purpose of the Williams Act, which

> contemplates unfettered choice by well-informed investors. Both the House and Senate Reports observed that "[t]his bill is designed to make the relevant facts known so that shareholders have a fair opportunity to make *their* decision."

J.S. App. 12a, quoting H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968), and S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967) (emphasis added by the court of appeals). Finally, the imposition of a lengthy pre-notification requirement under Ill. Ann. Stat. ch. 121 1/2, § 137.54.E—a requirement that Congress "has repeatedly rejected"[11]—impermissibly conflicts with the congressional purpose to allow tender offers to proceed on an expeditious basis without tipping the balance of advantage between the bidder and incumbent

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or tend to work a fraud or deceit upon the offerees * * *" (Ill. Ann. Stat. ch. 121 1/2, § 137.57.E (Smith-Hurd Cum. Supp. 1980) (emphasis added). The statute thus speaks in the disjunctive, making fraud, deceit, failure to disclose, and the inequitable character of the tender offer separate grounds for denial of registration. We note, in this connection, that appellant cites no state authority to support a contrary interpretation of the statute.

[11] J.S. App. 18a-19a. The court of appeals noted that Congress, on three separate occasions, has rejected proposals to impose pre-notification requirements. See *id.* at 19a n.23. In addition, two bills introduced in the 94th Congress would have amended the tender offer provisions of the Williams Act to require a 60-day pre-commencement filing with the Commission. S. 2522, 94th Cong., 1st Sess. § 3 (1975); H.R. 10650, 94th Cong., 1st Sess. § 3 (1975). A third bill would have required such a filing, and its transmission to the subject company, at least 21 days prior to commencement. H.R. 14317, 94th Cong., 2d Sess. § 5 (1976). None of these bills was reported out of committee.

management. See *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58-59 (1975) ("Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids * * *"); see also *Leroy* Amicus Br. 42-54.[12]

We do not, of course, contend that the federal government has occupied the entire field of securities regulation or that the states have no role to play. Congress has approved concurrent regulation of some types of securities transactions by state governments. Congress has forbidden, however, attempts by the states to regulate securities transactions in a manner that would undermine or conflict with the operation of federal law. See Section 28(a) of the Securities Exchange Act, 15 U.S.C. 78bb(a), which bars any state from enacting a law that conflicts with either the Securities Exchange Act or any rules or regulations issued by the Commission thereunder.[13] Thus, the Illinois statute is not invalid simply because it regulates tender offers, but rather

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[12]Unlike the Illinois statute, which delays the commencement of a tender offer until the bidder has complied with the statute's pre-commencement filing and review provisions, the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. 18a, does not delay commencement but merely precludes a bidder from purchasing tendered shares until it has received clearance from the Federal Trade Commission and the Department of Justice. 15 U.S.C. 18a(a). Moreover, the Hart-Scott-Rodino Act does not require, as does the Illinois statute, that a bidder make a public announcement of the material terms of its offer in the pre-commencement period. To the contrary, the Act provides for confidential treatment of the bidder's filing. 15 U.S.C. 18a(h).

[13]Section 28(a) provides in part:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

Section 28(a) "was designed to save state blue-sky laws from preemption" (*Leroy* v. *Great Western United Corp.*, *supra*, 443 U.S. at 182 n.13), but only insofar as such laws do not conflict with federal statutes and regulations.

because it regulates them in a way that conflicts with the Williams Act and frustrates the accomplishment of its objectives.

b. The court of appeals also correctly concluded (J.S. App. 24a-30a) that the Illinois takeover statute contravenes the Commerce Clause. See *Leroy* Amicus Br. 15-36. In reaching that conclusion, the court applied the familiar test set forth by this Court in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). *Pike* establishes that a state statute is invalid under the Commerce Clause if the burden that it imposes on interstate commerce outweighs the putative local benefits that it confers. See also *Kassel* v. *Consolidated Freightways Corp.*, No. 79-1320 (Mar. 24, 1981), slip op. 7, 14-15; *id.* at 1-2 (Brennan, J., concurring). After a careful examination of the claimed benefits of the Illinois statute, the court of appeals found that those benefits were in large measure speculative and were clearly outweighed by the obstructive effect of the statute on transactions in interstate commerce. The court observed (J.S. App. 25a-26a), with respect to Illinois' asserted interest in protecting resident securities holders, that the Williams Act already accorded shareholders the disclosure and substantive protections sought to be achieved by the Illinois statute. Consequently, the Illinois statute provided only a "marginal increase" in time and information available to Illinois shareholders (*ibid.*):

> Protecting resident investors is indisputably a legitimate state objective. Yet, as set forth above, the Williams Act itself protects investors by requiring disclosure, withdrawal rights, pro rata purchases and equal consideration for all shares taken up. Therefore, the benefit of the Illinois Act is limited to the marginal increase in information, time and other benefits that Illinois shareholders may gain as a result of the Act's operation. But, as we noted in the context of preemp-

> tion, the potentially prolonged delay required by the Act may, in some circumstances at least, be detrimental to the interests of shareholders. * * * Thus, the benefits flowing to Illinois shareholders from the Act are, to a significant degree, speculative.

The court of appeals also correctly rejected the assertion that interference with nationwide tender offers through local legislation was justifiable on a theory that the state was simply "regulating the internal affairs of a corporation incorporated under Illinois law" (J.S. App. 26a). See also *Leroy* Amicus Br. 28-31. The Illinois statute, on its face, regulates the relationship between shareholders and bidders, not the internal governance of the subject corporation. Moreover, the statute does not limit its coverage to companies incorporated under Illinois law. As the court of appeals explained (J.S. App. 28a), "the Act applies to corporations that are incorporated in another state and have their principal place of business outside of Illinois." Finally, Illinois need not enact statutes impeding tender offers to deal with internal corporate mismanagement such as "looting" or waste of assets (*id.* at 27a). Such mismanagement would be a breach of fiduciary duty subject to redress under traditional legal principles.

Having examined the benefits purportedly flowing from the Illinois statute, the court of appeals weighed those benefits against the statute's obstructive effect on interstate commerce. The court correctly found (J.S. App. 28a-29a) that the statute's negative impact on commerce outweighed the putative local benefits:

> The Act's most obvious burdens result from its global impact. Once the Act has been invoked, all purchases, or offers to purchase by the offeror, of the target company's stock pursuant to a tender offer may be halted, including transactions to be executed entirely outside

> the boundaries of Illinois. The Illinois Act thus possesses a significant potential to cause commercial disruption. For example, had the Secretary of State not been enjoined from going forward in the instant case, over 23 million dollars of interstate commerce would presumably have been affected. * * *
>
> We think that Illinois' tenuous interest in protecting resident shareholders and regulating control transfers cannot constitutionally justify the Illinois Act's burdensome impact on free-flowing commerce.

The court of appeals' analysis is consistent with the decisions of this Court. See *Kassel* v. *Consolidated Freightways Corp., supra;* see also *Leroy* Amicus Br. 31-36.[14]

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[14]Appellees argue that this appeal should be dismissed as moot. Motion to Dismiss or Affirm at 3-5. The court of appeals considered the issue of mootness and determined that, in view of MITE's potential criminal and civil liability for making a tender offer in violation of the Illinois statute (see Ann. Rev. Stat. ch. 121 1/2, §§ 137.63-137.65 (Smith-Hurd Cum. Supp. 1980)), the case was not moot (J.S. App. 6a).

Before the court of appeals, appellant took the position that appellees were subject to potential criminal or civil enforcement proceedings based on their violation of the Illinois statute. See J.S. App. 6a. The State has not, in this Court, disavowed an intent to institute such proceedings, in the absence of a definitive holding that its statute is unconstitutional. Thus, in view of "the flexible character of the Art. III mootness doctrine" (*United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 400 (1980)), the realistic possibility of enforcement proceedings based on appellees' past conduct may be sufficient to avoid mootness in this case. See generally, *Bethlehem Steel Corp.* v. *Train*, 544 F. 2d 657, 660 (3d Cir. 1976), cert. denied, 430 U.S. 975 (1977).

We note, however, that if the Court were to agree with appellees that this case is moot, the proper disposition would be not to dismiss the appeal but to vacate the judgment below and to remand with a direction to dismiss the complaint as moot. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

CONCLUSION

Probable jurisdiction should be noted, and the judgment of the court of appeals should be affirmed.[15]

Respectfully submitted.

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APRIL 1981

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[15]Because the court of appeals' decision correctly applies settled legal principles, and because the issues posed by appellant have not engendered disagreement among the courts of appeals, it is doubtful whether "the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution." Sup. Ct. R. 15.1(h). The Court therefore may wish to consider summary affirmance.

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No. 80-1188

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES EDGAR,
APPELLANT,

v.

MITE CORPORATION AND MITE HOLDINGS, INC.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

Whether the Illinois Business Take-Over Act conflicts with the Williams Act amendments to the Securities Exchange Act of 1934?

Whether the Illinois Business Take-Over Act regulates evenhandedly to effectuate strong legitimate local interests that outweigh the incidental effect on interstate commerce, and is valid under the commerce clause?

LIST OF PARTIES

JAMES EDGAR, Appellant

MITE CORPORATION and MITE HOLDINGS, INC., Appellees

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MITE CORPORATION AND MITE HOLDINGS, INC.,
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BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, has not been reported, but is included in the appendix to the Jurisdictional Statement at p. 32a. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 633 F.2d 486 (7th Cir. 1980).

JURISDICTION

Appellees initiated this action in the United States District Court for the Northern District of Illinois, Eastern Division pursuant to Section 27 of the Securities and Exchange Act of 1934 (15 U.S.C. §78aa), 28 U.S.C. §§1332, 1337 and 42 U.S.C. 1983, and the district court held that the Illinois Business Take-Over Act (Ill. Rev. Stat. 1979, ch. 121½, §137.51 et. seq.) was unconstitutional.

The judgment of the United States Court of Appeals for the Seventh Circuit, affirming the district court, was entered on October 17, 1980. See p. 42a. A notice of appeal to this Court was duly filed on January 5, 1981, in the United States Court of Appeals for the Seventh Circuit. See p. 43a.

The United States Supreme Court noted probable jurisdiction on May 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, section 8 of the United States Constitution provides in pertinent part that:

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article VI of the United States Constitution provides in pertinent part that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be

> the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Illinois Business Take-Over Act, Ill. Rev. Stat. 1979, ch. 121½, §137.51 et seq. (See Appendix to Jurisdictional Statement, p. 45a)

Williams Act amendments to the Securities Exchange Act of 1934 (15 U.S.C. §78m(d)-(e), 78n(d)-(f)(1976). The pertinent sections are set forth in the Appendix to the Jurisdictional Statement, at 65a.

STATEMENT OF THE CASE

Appellant, James Edgar, is the Secretary of State of Illinois and is charged with the administration and enforcement of the Illinois Business Take-Over Act (Ill. Rev. Stat. 1979, ch. 121½, §137.51 *et seq.*) (the "Illinois Act"). MITE Corporation and MITE Holdings, Inc., (collectively "MITE") sought to make a cash tender offer for the shares of Chicago Rivet and Machine Co. ("Chicago Rivet") without having to comply with the Illinois Act. Chicago Rivet is a publicly-held Illinois Corporation with its principal executive offices in Bellwood, Illinois. Chicago Rivet has 866,264 shares of common stock outstanding and 2,181 shareholders of record. Of those shareholders, 589 are residents of Illinois, and they own 377,395 common shares.

On January 19, 1979, MITE filed a Schedule 14D-1 with the Securities and Exchange Commission (the "SEC") concerning its proposed tender offer, pursuant to section 14(d)(1) of the Williams Act, 15 U.S.C. §78n(d)(1)(1976), and Regulation 14D promulgated thereunder. MITE's proposed tender offer of $28.00 per share for all the shares of Chicago

Rivet represented a premium of more than $4.00 per share over the market price preceding announcement of the offer.

MITE initiated this action on January 19, 1979, seeking to have the district court declare the Illinois Act null and void on its face because it violated the supremacy and commerce clauses of the United States Constitution. In addition MITE sought injunctive relief prohibiting then Secretary of State Alan J. Dixon and Chicago Rivet from enforcing the Illinois Act against it in connection with its proposed tender offer.

On January 22, 1979, Chicago Rivet filed an action in the Court of Common Pleas of Blair County, Pennsylvania, alleging that MITE was in violation of the Pennsylvania Take-Over Disclosure Law, 70 Pa. Cons. Stat. Ann. tit. 70, §71 *et seq.* (Purdon Supp. 1978). The court issued an *ex parte* order enjoining MITE from pursuing its tender offer pending further hearing on January 26, 1979. On January 22, 1979, Chicago Rivet also filed a complaint with the Pennsylvania Securities Commission. MITE removed the action filed in the Court of Common Pleas of Blair County to the United States District Court for the Western District of Pennsylvania, and also filed a complaint seeking to have the Pennsylvania Act declared unconstitutional and to have its enforcement enjoined. On January 31, 1979, the Pennsylvania Securities Commission determined that it would not invoke the Pennsylvania Act, and on the next day the District Court for the Western District of Pennsylvania denied Chicago Rivet's motion for a temporary restraining order.

On February 1, 1979, Dixon executed a temporary cease and desist order and notice of hearing regarding the proposed tender offer and notified MITE that the order and notice would be served February 5, 1979. On February 2, 1979, the district court entered an order preliminarily enjoining Dixon from enforcing the Illinois Act against MITE in connection with its tender offer for the shares of Chicago Rivet. MITE published

its tender offer to all shareholders of Chicago Rivet in the national edition of the Wall Street Journal on February 5.

The district court entered its final judgment order on February 9, 1979, declaring the Illinois Act to be null and void. The district court held that the Illinois Act was preempted by the Williams Act and created an undue burden on interstate commerce in violation of the commerce clause. The district court also permanently enjoined Dixon from enforcing the Illinois Act against MITE in connection with its tender offer for the shares of Chicago Rivet.

Appellant appealed to the Court of Appeals for the Seventh Circuit from the final judgment order of the district court declaring the Illinois Act to be null and void. The Court of Appeals for the Seventh Circuit affirmed, holding that the Illinois Act was preempted by the Williams Act and also constituted an undue burden on interstate commerce in violation of the commerce clause.

SUMMARY OF ARGUMENT

I. The Williams Act amendments to the Securities Exchange Act of 1934, 15 U.S.C. §§78m(d)-(e), 78n(d)-(f) (1976), resulted from the growing use of the cash tender offer as an unregulated method of corporate acquisition. The sole purpose of the Williams Act was to protect investors confronted with a tender offer. *Piper v. Chris-Craft Industries Inc.*, 430 U.S. 1, 22, 35(1977). Illinois is among the great majority of states than have enacted state takeover statutes, which supplement the protection afforded investors in the Williams Act.

When the exercise by a state of its police power is challenged under the Supremacy Clause, the beginning assumption is that the historic police powers of the States are not superseded "unless that was the clear and manifest purpose of

Congress." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). Congress has not expressly barred the states from regulating tender offers, and this Court has said that section 28(a) of the 1934 Act, 15 U.S.C. §78bb(a)(1976), "was plainly intended to protect, rather than to limit, state authority." *Leroy v. Great Western United Corp.*, 443 U.S. 173, 182(1979). Although the Seventh Circuit Court of Appeals said that section 28(a) was designed to save state Blue Sky laws, the Williams Act is within the scope of the savings clause, which has prospective effect.

Congress has not implicitly preempted concurrent state regulation of tender offers, as the Williams Act is not a pervasive scheme of legislation that occupies the whole field. Nor is the field of securities regulation an area of paramount federal importance, such as national security or foreign affairs, in which federal legislation that is not pervasive will nevertheless preempt state legislation. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

The coexistence of federal and state regulation of securities transactions is established, and the "proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414, U.S. 117, 127 (1973). The objective of the Williams Act to protect the investor confronted with a tender offer does not require uniformity or exclusivity so as to preclude supplemental state regulation.

There is no conflict between the Illinois Act and the Williams Act that renders compliance with both impossible. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Nor does the Illinois Act stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Williams Act. *Hines, supra*, at 67.

The Williams Act is basically a minimum disclosure statute. Apart from requiring disclosure the Williams Act also gives tendering shareholders the right to withdraw stock within the first seven days of an offer or anytime after sixty days. If an offer is for less than all of the outstanding shares, those shares tendered in the first ten days must be taken up pro rata by the offeror. If the amount of consideration is increased all tendering shareholders will receive the higher price. The Williams Act also has a broad antifraud provision.

The purpose of the Williams Act is to protect the investor as opposed to making a definitive balance between the position of the offeror and that of incumbent management. *Piper, supra,* at 35. Any congressional policy of evenhandedness does not go to the purpose of the legislation. The Seventh Circuit Court of Appeals, however, said that the Williams Act was also designed to preserve a neutral balance between incumbent management and offeror. By providing an investor with additional protection, the Illinois Act does not thwart the purpose of Congress in enacting the Williams Act merely because the balance between the offeror and incumbent management may be affected. If Congress had intended for the Williams Act to create a definitive balance between the offeror and incumbent management, it could have easily expressed such an intent in clear and unambiguous language. *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 415 (1973).

The Illinois Act requires an offeror to file a registration statement with the Secretary of State, but the Secretary can accept the filing required by the federal government. (Ill. Rev. Stat. 1979, ch. 121½, §137.54C., D.). The offer becomes registered 20 business days later, unless the Secretary accelerates or delays the period or calls a hearing. (Ill. Rev. Stat. 1979, ch. 121½, §137.54E.). A hearing is to commence within ten days and the Secretary is to issue a decision within

fifteen days, unless the Secretary extends the period for the protection of Illinois offerees. (Ill. Rev. Stat. 1979, ch. 121½, §137.57C., E.). The Illinois Act does not create an exemption for a friendly takeover, and it regulates the activities of the target company as well as those of the offeror.

The Seventh Circuit Court of Appeals said that Congress has specifically rejected proposals for a prenotification period, and that hearings are not contemplated under the Williams Act. *MITE Corp. v. Dixon*, 633 F.2d 486, 497 (7th Cir. 1980). The fact that Congress considered but did not adopt an advance notice rquirement does not establish that inclusion of such a provision in the Illinois Act conflicts with the Williams Act. *DeCanas v. Bica*, 424 U.S. 351, 360 (1976).

The time periods within which the Secretary is to hold a hearing and issue a decision do not create delays of possibly infinite duration merely because the Secretary is empowered to extend the periods when necessary to protect the interests of Illinois offerees. The fact that the Secrtary must hold a hearing if requested by a majority of the outside directors or Illinois residents holding 10% of the shares of the target company does not provide incumbent management with the means to create lengthy delay as the Secretary will administer his duties expeditiously in the interest of Illinois residents who are shareholders of the target company. Reasonable delay is appropriate as it allows investors adequate time to make an informed decision and also creates the potential for an auction market in which a competitive bid might be made. The reasonable delay necessitated by the Illinois Act will not preclude the making of tender offers.

The Seventh Circuit Court of Appeals also said that the Illinois Act deviates from a market approach and adopts a "benevolent bureaucracy" approach, but the Secretary has never contended that his review of a tender offer would encompass looking at the substantive fairness of the amount of

the offer. The inclusion of the word "inequitable" in section 7.E. of the Illinois Act is coupled with "fraud" and "deceit" and does not empower the Secretary to review the amount of the offer.

As noted by the Seventh Circuit Court of Appeals the new rules promulgated by the SEC governing tender offers are inapplicable to the case at bar. 17 C.F.R. §240-14d-1 *et seq. MITE, supra,* at 499, n.25. The Illinois Act does not stand as an obstacle to the sole purpose of Congress in enacting the Williams Act, which was to protect investors confronted with a tender offer.

II. The power of the federal government to regulate commerce under the Commerce Clause "does not exclude all state power of regulation." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 140 (1973). State legislation serving legitimate local interests that does not discriminate against interstate commerce is valid even though it affects commerce. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978). In areas in which federal and local powers are concurrent a "delicate adjustment" must be made of the conflicting state and federal claims. *Id.* at 440. When a statute regulates evenhandedly to advance legitimate local interests and "its effects on interstate commerce are only incidential" it will prevail unless the burden imposed "is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). When a legitimate local interest is present, the question becomes one of degree, and the degree of burden that is permissible depends on the nature of the local interest and whether it could be served with a lesser effect on interstate commerce. *Id.* at 142.

Chicago Rivet is an Illinois corporation and its principal executive office is in Illinois. Over 43% of Chicago Rivet's common stock is held by the 27% of its shareholders who are residents of Illinois. The Seventh Circuit Court of Appeals said

that the Illinois Act could apply even if no shareholders resided in Illinois, but the Secretary could exempt such an offer as not necessary for the protection of Illinois securityholders. (Ill. Rev. Stat. 1979, ch. 121½, §137.52-9 (5)). The Illinois Act also contains a comity provision. (Ill. Rev. Stat. 1979, ch. 121½, §137.53.).

The Illinois Act advances two legitimate local interests by protecting resident shareholders and regulating the transfer of control of an Illinois or Illinois based corporation. Protecting investors residing in a state has long been recognized as a legitimate state objective. *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917). The Illinois Act supplements the protection provided in the Williams Act by ensuring that resident investors have adequate time to make an informed decision and that there has been proper disclosure.

Illinois also has a legitimate local interest in regulating the transfer of control of an Illinois or Illinois based corporation with substantial contacts in the state. Regulation of a tender offer is sufficiently similar to regulating the internal affairs of an Illinois corporation in matters such as a merger or other fundamental corporate changes, shareholder liability and election of directors. Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case Western L. Rev. 722 (1970); Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation*, 36 Wash. and Lee L. Rev. 733 (1979). Regulation of the internal affairs of a corporation based in a state is historically a proper subject of state regulation as the corporation is a creature of the state. *Sante Fe Industries v. Green*, 430 U.S. 462, 479 (1977).

The Illinois Act has only an incidental effect on interstate commerce, and it does not impede the ability of an offeror to make a tender offer. The pre-offer filing, the possibility of a hearing and longer duration of an offer are simply not burdens

of a magnitude that would preclude an offeror from making a tender offer. The extraterritorial effect of the Illinois Act is a necessary consequence to protecting Illinois shareholders, who could otherwise be simply excluded from a tender offer.

The Seventh Circuit court of Appeals said that had the Secrtary not been enjoined over 23 million dollars of interstate commerce would have been affected. It is wrong, however, to judge the Illinois Act by what the effect of non-compliance would be on interstate commerce. Complying with the Illinois Act would cause the offeror to incur an additional expense, but this is a slight burden in relation to the cost of purchasing another company.

Illinois' substantial interests in ensuring that its residents who are confronted with a tender offer have adequate time to make an informed decision based on complete disclosure is substantial. Likewise Illinois has a substantial local interest in regulating the transfer of control of an Illinois or Illinois based corporation. These interests outweigh the burden of compliance, which merely creates an expense for the offeror that is incidental to the acquisition of another company.

ARGUMENT

I.

THE ILLINOIS BUSINESS TAKE-OVER ACT IS NOT INFIRM UNDER THE SUPREMACY CLAUSE BECAUSE STATE REGULATION THAT PROVIDES ADDITIONAL PROTECTION FOR THE SHAREHOLDER CONFRONTED WITH A TENDER OFFER DOES NOT CONFLICT WITH THE WILLIAMS ACT.

The Williams Act amendments to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f)(1976), resulted from the increasing use of the cash tender offer during

the 1960's as a virtually unregulated method of corproate acquisition. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S.1, 22(1977). When Congress enacted the Williams Act the State of Virginia had already enacted a statute regulating takeovers (Va. Code §§ 13.1-528 *et seq.*(1978), effective March 5, 1968). Illinois is among the great majority of states that have subsequently enacted statutes regulating tender offers.[1] This Court has said that the sole purpose of the Williams Act was to protect investors confronted with a tender offer. *Piper, supra* at 35. The Illinois Business Take-Over Act (Ill.Rev.Stat. 1979, ch. 121 1/2, §137.51 *et seq.*) (hereinafter "Illinois Act") supplements the protection afforded a shareholder confronted with a tender offer and does not stand as an obstacle to the accomplishment of the purpose of Congress in enacting the Williams Act.

When the exercise by a state of its police power is challenged under the Supremacy Clause, this Court said in *Ray v. Atlantic Richfield Co.*, 435 U.S.151, 157(1978), that:

> '[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947); *Jones v. Rath Packing Co.*, 430 U.S.519, 525,51 L.Ed.2d 604,97 S.Ct. 1305(1977).

The Seventh Circuit Court of Appeals did not hold that Congress has expressly barred the states from regulating tender offers. *MITE Corp. v. Dixon*, 633 F.2d 486(7th Cir. 1980). This Court has already said that Section 28(a) of the Securities Ex-

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[1] See, Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L.J. 510, 514-515, n29(1979)(hereinafter *"Tender Offer Statutes Reconsidered"*), which lists the analogous statutes enacted in 36 States.

change Act of 1934[2] "was plainly intended to protect, rather than to limit, state authority." *Leroy v. Great Western United Corp.*, 443 U.S. 173, 182(1979). The Williams Act contains no language explicitly preempting concurrent state regulation of tender offers, and on the occasions that Congress has amended the Williams Act it has not expressly preempted state takeover statutes. *AMCA International Corp. v. Krouse*, 482 F.Supp.929, 935(S.D. Ohio, 1979).

The Seventh Circuit Court of Appeals said, however, that section 28 of the 1934 Act was designed to save state Blue Sky laws. *MITE, supra* at 491, n.5. Any argument that the savings clause in the 1934 Act is inapplicable to cash tender offers because they were not in existence at that time does not of course provide a basis for inferring that Congress did intend to preempt state regulation of tender offers. One commentator has argued that the legislative history of the 1934 Act does not indicate that the savings clause was intended to be only retrospective and that Congress did contemplate concurrent regulation of all aspects of securities.[3] Also tender offers are similar to proxy solicitations, which states have traditionally regulated. Accordingly, the Williams Act is within the scope of the savings clause of the 1934 Act.

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[2] Section 28(a), as set forth in 15 U.S.C. §78bb(a)(1976), provides in pertinent part:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

[3] Note, *Preemption and the Constitutionality of State Tender Offer Legislation*, 54 Notre Dame Law. 725, 731-32(1979).

Although Congress may implicitly preempt all state regulation by enacting a pervasive scheme of legislation that occupies the whole field, the Williams Act is not an example of such legislation. The Williams Act, which provides for disclosure and certain minimum substantive rights, is not comparable to a pervasive scheme of federal regulation such as the regulation of aircraft noise that led to a conclusion of preemption in *Burbank v. Lockheed Air Terminal*, 411 U.S. 624,629-33(1973). Nor is the field of securities regulation an area of paramount federal importance, such as national security or foreign affairs, in which federal legislation that is not pervasive will nevertheless preempt state legislation. See *Pennsylvania v. Nelson*, 350 U.S. 497, 504-505(1956); *Hines v. Davidowitz*, 312 U.S. 52, 67(1941).

The coexistence of federal and state regulation of securities transactions is established. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117,127(1973); *SEC v. National Securities*, 393 U.S. 453,461(1961). The established historical precedent of dual state and federal regulation in the field of securities regulation demonstrates that Congress did not implicitly rule out supplementary state regulation of tender offers by enacting the Williams Act. The objective of the Williams Act to protect the investor confronted with a tender offer does not require uniformity or exclusivity so as to preclude supplemental state regulation. In considering the regulatory scheme contained in the Illinois Act with that contained in the Williams Act, the "proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill Lynch, supra* at 127.

As Congress has not explicitly or implicitly preempted state regulation of tender offers, the resulting inquiry is whether the Illinois Act conflicts with the Williams Act. When state regulation conflicts directly with federal regulation so that compliance with both is impossible, state regulation is exclud-

ed without inquiry into congressional design. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43(1963). As no such conflict is present, between the Illinois Act and the Williams Act, the validity of the Illinois Act depends upon whether it "stands as an obstable to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Williams Act. *Hines, supra*, at 67. Whether the Illinois Act constitutes such an obstacle requires determining if Congress, in addition to providing protection for an investor confronted with a tender offer, also intended that the Williams Act would establish a definitive balance between the offeror and the target company management that could not be altered.

The Williams Act is basically a minimum disclosure statute. Section 13(d) requires that any person who acquires more than 5% of a class of securities registered under section 12 must within 10 days send to the issuer and file with the SEC a statement disclosing the background and identity of the offeror, the source and amount of funds, any plans to liquidate or sell the assets of the issuer or merge it, the number of shares held, and any arrangements with any person regarding any securities of the issuer. (15 U.S.C. §78m(d)(1976)). Section 14(d) provides that prior to initiating a tender offer, the offeror must file a statement with the SEC containing the information required by section 13(d) and any other information which the SEC may require along with copies of the solicitations. (15 U.S.C. §78n(d)(1976)). Apart from requiring disclosure the Williams Act also affords shareholders certain substantive rights. Tendering shareholders can withdraw stock within the first seven days of an offer or any time after sixty days. (15 U.S.C. §78n(d)(5)(1976)).[4] When a tender offer is for less than all of the outstanding shares those shares

[4] The SEC has extended the seven day withdrawal period contained in the Williams Act to fifteen business days. 17 C.F.R. §240.14d-7(1979).

tendered during the first ten days must be taken up pro rata by the offeror. (15 U.S.C. §78n(d)(6)(1976)). If the amount of consideration is later increased all tendering shareholders will receive the higher price. (15 U.S.C. §78n(d)(7)(1976)). The Williams Act also contains a broad antifraud provision. (15 U.S.C. §78n(e)(6)(1976)).

The overriding theme of the Williams Act is that of protecting the investor as opposed to undertaking a definitive balancing of the position of an offeror versus that of the target company management. In *Piper v. Chris-Craft Industries Inc.*, *supra* this Court held that Congress did not contemplate a private cause of action by an unsuccessful offeror. As noted this Court said that the sole purpose of the Williams Act was to protect investors confronted with a tender offer. *Piper, supra* at 35. Although Congress sought a policy of evenhandedness, this does not go to the purpose of the legislation. *Id.* at 29. The Chairman of the Securities and Exchange Commission testified that:

> . . . [T]he principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor who today is just a pawn in a form of industrial warfare. . . . The investor is lost somewhere in the shuffle. This is our concern and our only concern. Hearings before the Subcommittee on Securities of the Senate Committee on Banking and Currency on S.510, 90th Cong., 1st Sess., 178(1967).

The Seventh Circuit Court of Appeals, however, concluded that the Williams Act protects investors by a "market approach" and is also designed to preserve a neutral balance between incumbent management and offeror. *MITE, supra* at 492-93. See *Great Western United Corp. v. Kidwell*, 577 F.2d 1256(5th Cir. 1978). By providing an investor confronted with a tender offer with additional protection, the Illinois Act,

however, does not thwart the purpose of Congress in enacting the Williams Act merely because the balance between the offeror and incumbent management may be affected or a particular offeror might not prevail.

The mere congressional expressions in favor of neutrality do not transform the Williams Act into a comprehensive national policy regarding all aspects of tender offers, which would only be made after careful legislative weighing of all the political and economic ramifications.[5] This Court has refused to find a cause of action when it would serve "at best a subsidiary purpose" of the federal legislation. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 478(1977). If Congress had intended for the Williams Act to create a definitive balance between the offeror and incumbent management, precluding supplemental regulation by the states, it could have easily expressed such an intent in clear and unambiguous language. *New York State Department of Social Services v. Dublino*, 413 U.S. 405,415(1973). As the Williams Act is not a pervasive scheme of legislation that occupies the field and there is a historical precedent of dual federal and state regulation of securities, the Illinois Act cannot be deemed preempted by the Williams Act merely because it might alter the positions of the offeror and target company as a result of enhancing the protection afforded an investor.

To register a takeover offer under the Illinois Act an offeror must file with the Secretary of State and mail to the target company a registration statement disclosing the information required by the Williams Act and certain additional information, but the Secretary may accept in lieu of the registration statement the filing required by the federal government. (Ill.Rev.Stat.1979, ch. 121 1/2, §137.54C.,D.)(A.49a-52a).

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[5] See Shipman, *Some Thoughts About The Role Of State Takeover Legislation: The Ohio Takeover Act*, 21 Case Western L. Rev. 722, 759-60(1970).

The Illinois Act provides that an offer becomes automatically registered 20 business days after the filing of the registration statement, unless the Secretary accelerates or delays the period or calls a hearing.[6] (Ill.Rev.Stat.1979, ch. 121 1/2, §137.54E.)(A. 52a). The Illinois Act provides for a hearing if the Secretary deems it necessary for the protection of Illinois offerees, or if one is requested by a majority of the outside directors or by Illinois residents who hold at least 10% of the shares (Ill.Rev.Stat.1979, ch. 121 1/2, §137.57A.) The hearing is to commence within ten days, unless extended by the Secretary for the protection of Illinois offerees or the convenience of the parties, and the Secretary is to issue a decision within fifteen days of the hearing unless the protection of Illinois offerees requires an extension. (Ill.Rev.Stat.1979, ch. 121 1/2, §137.57 C.,E.).[7]

The Illinois Act does not create an exemption for a friendly takeover, and it regulates the activities of the target company as well as those of the offeror. The Illinois Act requires the

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[6] The 20 day pre-offer filing required under the Illinois Act conflicts with the SEC's new Rule 14-d-2. 17 C.F.R. §240.14d-2b. The Seventh Circuit Court of Appeals did not rely on the new SEC rules because those rules do not apply to tender offers made prior to their effective date. 44 Fed.Reg. 70326(1979). Cf. *AMCA, supra,* 482 F.Supp. at 933-34, n.4.

[7] The Illinois Act also supplements the substantive benefits afforded offerees by the Williams Act in requiring that an offer must remain open for a minimum of 20 calendar days, and that an offeree may withdraw shares tendered during the first 17 calendar days after the offer is made. The foregoing time periods would also apply to any material change in the terms of the offer. (Ill.Rev.Stat.1979 ch. 121 1/2, §137.59 B.,C.). The Act also provides that when an offer is for less than all the outstanding shares, the shares must be taken up pro rata. (Ill.Rev.Stat.1979, ch. 121 1/2, §137.59D.). In its opinion the Court of Appeals did not make a determination whether these provisions would also be preempted by the Williams Act. *MITE, supra* at 499 n.25.

target company as well as the offeror to submit any solicitation material to the Secretary of State. (Ill. Rev. Stat. 1979, ch. 121½, §137.55.) (A.52a). The target company is prohibited from soliciting against a takeover offer before it becomes registered, except that a target company may communicate with its securityholders as permitted by the 1934 Act. (Ill. Rev. Stat. 1979, ch. 121½, §137.58.(1)) (A.54a-55a). The target company is subject to the antifraud provisions of the Act as well as the provisions for criminal sanctions. (Ill. Rev. Stat. 1979, ch. 121½, §137.63.A., B.) (A.60a). This is unlike the situation in *Kidwell,* in which the court said that the Idaho Act provides substantially weaker regulation of the activities of the target company. *Kidwell, supra* at 1279. The Idaho Act also provided the target company with the ability to exclude an offer from regulation by approving it. *Id.* at 1278.

The Seventh Circuit Court of Appeals held that the pre-offer notification period and the hearing provision in the Illinois Act conflict with the Williams Act and shift the balance in favor of the target company. *MITE, supra* at 494-95; (A.14a-15a). The court said that Congress has "repeatedly rejected proposals for prenotification" periods. *Id.* at 497; (A.19a). The court also said that no hearings are contemplated under the Williams Act. *Id.* at 497; (A.19a). The mere fact that Congress considered but did not adopt an advance notice requirement does not establish that the inclusion of such a provision in the Illinois Act conflicts with the Williams Act. *DeCanas v. Bica*, 424 U.S. 351, 360 (1976). Similarly, the fact that the Williams Act does not provide for a hearing does not mean that Illinois is preempted from allocating additional government resources to enforce the provisions in the Illinois Act through an administrative hearing.

The Court of Appeals said that the time periods in the Illinois Act, within which the Secretary is to hold a hearing and issue a decision, create delays of possibly infinte duration

because the Secretary is empowered, when necessary to protect the interests of Illinois offerees, to extend the periods. *MITE, supra* at 494-95; (A.14a-15a). In conjunction with the foregoing, the Court also found objectionable the provision providing that the Secretary shall hold a hearing if requested by a majority of the outside directors of the target company or residents of Illinois holding 10% of the stock. The Court said that this would give incumbent management a means to stymie a takeover indefinitely. *Id.* at 494-95; (A.14a-15a). Although the respective ten and fifteen day periods, in which the Secretary is to hold a hearing and issue a determination, could be extended by the Secretary when necessary, they certainly constitute legislative guidelines within which the Secretary would usually act. Even if incumbent management can cause a hearing to be held as the Court of Appeals said, this hardly establishes that incumbent management could cause indefinite delay as the Secretary will administer the Illinois Act to protect the interests of Illinois shareholders. Review by the Secretary will not necessarily result in greater delay as the target company can already seek injunctive relief in the courts.

The question of whether some delay benefits the investor has been the subject of much debate as noted by the Court of Appeals. The opponents of the Williams Act predicted that it would have a crippling effect upon offerors, but it has been suggested that the Williams Act had no impact on the relative strength of management and the offeror. *Shipman, supra* n.5 at 760-61. The Williams Act only provides certain minimum requirements, and the reasonable delay necessitated by the Illinois Act will allow investors more time in which to make an informed decision while also ensuring compliance with the disclosure requirements through neutral review by the Secretary. Despite the increasing number of state takeover statutes the use of the tender offer mechanism for corporate

acquisition has not lessened. *AMCA, supra* at 938; *Tender Offer Statutes Reconsidered, supra* n. 1, at 523; Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U.L. Rev. 872, 902, 913-14 (1978). The reasonable delay necessitated by the Illinois Act will not preclude the making of tender offers even though a particular offeror might be ultimately unsuccessful if in the interim a competitive bid is made. If the shareholders receive a better price because of an auction market, the purpose of the Williams Act is not thwarted merely because the first offeror was unsuccessful.

Apart from the foregoing, the Court of Appeals also said that the Illinois Act deviates fundamentally from the market approach in the Williams Act by adopting a "benevolent bureaucracy" approach because section 7.E. of the Illinois Act provides, in pertinent part, that:

> If the Secretary finds that the takeover offer fails to provide full and fair disclosure to the offerees of all material information concerning the takeover offer, *or that the takeover offer is inequitable or would work or tend to work a fraud or deceit upon the offerees,* ... the Secretary shall by order deny the registration of the takeover offer or condition its registration upon certain changes or modifications ... (emphasis added) Ill. Rev. Stat. 1979, ch. 121½, §137.57.E. (A.54a).

The Court of Appeals said that inclusion of "or that the takeover offer is inequitable" empowers the Secretary to pass on the substantive fairness of the offer. The Secretary has not construed this section as empowering him to judge the substantive fairness of the amount of the premium over the market price, which remains the unfettered decision of the investor. The word "inequitable" is coupled with "fraud" and "deceit" and simply does not put the Secretary in the position

of looking at the amount of the offer.[8] Review by the Secretary of whether there has been full disclosure, or whether the offer would be inequitable or work a fraud or deceit protects the shareholder who, in the absence of incomplete or misleading disclosure or fraud, will decide whether to tender his shares. Protecting the shareholder against fraud is not inconsistent with the Williams Act, which contains anti-fraud provisions. 15 U.S.C. §§78m(e), 78n(e) (1976).

As noted by the Seventh Circuit Court of Appeals the new rules promulgated by the SEC governing tender offers are inapplicable to the case at bar. 17 C.F.R. §240-14d-1 *et seq. MITE, supra* at 499 n. 25. As the instant tender offer preceded the effective date of the new rules, the question of whether the SEC exceeded its authority or of whether the Illinois Act is valid under the new rules is not before this Court.

Review of the supplemental protection afforded investors confronted with a tender offer under the Illinois Act demonstrates that it does not conflict with sole purpose of Congress in enacting the Williams Act, which was to protect investors.[9] Securities regulation is a field in which coordinate state and federal regulation is well established. The protection of investors is not dependent upon the exclusivity of the Williams Act. The Illinois Act regulates the activities of the target com-

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[8] Although this is stated in the disjunctive "or" Illinois decisional law does permit construing "or" as the conjunctive "and" when "a literal reading is inconsistent with an apparent legislative purpose". *Campbell v. Prudential Insurance Co. of America*, 15 Ill. 2d 308, 155 N.E.2d 9, 10-11 (1959).

[9] See *AMCA, supra* 482 F. Supp. 929; *City Investing Co. v. Simcox*, 476 F. Supp. 112 (S.D. Ind. 1979), *aff'd*, 633 F.2d 56 (7th Cir. 1980); *Strode v. Esmark, Inc.*, [1980] Fed. Sec. L. Rep. (CCH) ¶97, 538 (Ky, Cir. Ct. 1980); *Wylain, Inc. v. TRE Corp.*, 412 A. 2d 338 (Del. Ch. 1980).

pany and the offeror and maintains a market approach consistent with the Williams Act. Strengthening the position of the investor, by ensuring that he has adequate time to make an informed decision and that an offeror has complied with the Act, does not stand as an obstacle to effectuating the sole purpose of Congress in enacting the Williams Act to protect the investor. When Congress enacted the Williams Act it neither explicitly nor implicitly preempted concurrent state regulation of tender offers. As the Illinois Act advances the purpose of the Williams Act, it is manifestly clear that the Illinois Act is valid under the Supremacy Clause.

II.

STATE TAKEOVER LEGISLATION WHICH REGULATES EVENHANDEDLY TO EFFECTUATE LEGITIMATE LOCAL INTERESTS, THAT OUTWEIGH THE INCIDENTAL EFFECT ON INTERSTATE COMMERCE, DOES NOT CONTRAVENE THE COMMERCE CLAUSE.

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States. . . ." U.S. Const., Art. 1, §8, cl. 3. It is settled, however, that "the National Government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 140 (1973). State legislation serving legitimate local interests that does not discriminate against interstate commerce is valid under the Commerce Clause even though it affects commerce. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978). In *Raymond* this Court quoted the established rule that:

> "[I]n areas where activities of legitimate local concern overlap with the national interests expressed by

> the Commerce Clause — where local and national powers are concurrent — the Court in the absence of congressional guidance is called upon to make 'delicate adjustment of the conflicting state and federal claims.' *H.P. Hood & Sons, Inc. v. DuMond, supra*, at 553, [93 L. Ed. 865, 69 S. Ct. 657] (Black, J., dissenting) . . . ." *Id.* at 440.

The test used in making the "delicate adjustment" is contained in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), in which this Court said that:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

It is clear that the Illinois Act regulates evenhandedly as it ensures equal treatment of all shareholders in the target company and does not distinguish between shareholders residing within and without Illinois. Similarly, the Illinois Act applies equally to Illinois offerors and foreign offerors. Nor does the Illinois Act differentiate between "hostile" and "friendly" offers.

A "target company" under the Illinois Act is one in which 10% of the shares are held by securityholders located in Illinois, or that meets two of the following conditions: (a) has its principal executive office in [Illinois]; (b) is organized under the laws of [Illinois]; (c) has at least 10% of its stated capital

and paid-in surplus represented in [Illinois] (Ill. Rev. Stat. 1979, ch. 121½, §137.52-10). Chicago Rivet is an Illinois corporation with its principal executive office in Illinois. Over 43% of Chicago Rivet's common stock is held by the 27% of its shareholders who are residents of Illinois. The Seventh Circuit Court of Appeals said that the Illinois Act would have applied even if no shareholder of Chicago Rivet resided in Illinois. If no shareholders resided in Illinois, however, the Secretary could exempt the offer from registration as not necessary for the protection of Illinois securityholders. (Ill. Rev. Stat. 1979, ch. 121½, §137.52-9 (5)). The Illinois Act also contains a comity provision, which provides that when the Secretary of State finds that another jurisdiction is applying a statute that affords substantially equal protection, the registration and filing requirements of the Illinois Act will not apply. (Ill. Rev. Stat. 1979, ch. 121½, §137.53.).

The Illinois Act advances two legitimate local interests by protecting resident shareholders and regulating the transfer of control of an Illinois or Illinois based corporation. Protecting investors residing in a state has long been recognized as a legitimate state objective. *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 551 (1917). *AMCA, supra*, 482 F. Supp. at 939. The Illinois Act supplements the protection provided in the Williams Act by ensuring that resident shareholders will have adequate time to make an informed decision, and that review by the Secretary will ensure that the offeror has complied with the disclosure requirements.

Illinois has a second legitimate local interest in regulating the transfer of control of Illinois or Illinois based corporations with substantial contacts in the State. Illinois can regulate the internal affairs of an Illinois corporation in matters such as a merger or other fundamental corporate changes, shareholder liability and election of directors. See Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case Western Reserve L. Rev. 722, 742-5 (1970); Boehm,

State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation, 36 Wash. and Lee L. Rev. 733, 743-46 (1979). A tender offer is sufficiently analogous to traditional internal affairs transactions of a corporation which are the subject of state regulation. A successful tender offer means a shift in control in which the initial step is a change in the directors or their policies. A tender offer is like a de facto proxy solicitation because the securityholder who retains some of his shares is also "electing future directors and determining future board policy to govern the remainder of his securities." Shipman, *supra*, at 744. Congress recognized that tender offers are functionally equivalent to proxy fights. H.R. Rep. No. 1711, 90th Cong. 2d Sess (1968). A securityholder who retains his shares in effect receives new shares with a reduction in his voting power. A tender offer does not, however, result in a change in the formal corporate structure, and there is an absence of action contractually binding all shareholders at the corporate level such as in a merger. But a successful offeror will acquire a fiduciary relationship to the corporation and its securityholders. The offeror will obtain control through the securityholders acting in unison via the mechanism of the tender offer. The cumulative effect of a tender offer so closely resembles a proxy solicitation that Illinois can regulate a tender offer as an internal affair of an Illinois or Illinois based corporation. Shipman, *supra*, at 745.

The Illinois Act regulates the internal affairs of an Illinois or Illinois based corporation, which is historically a proper subject of state regulation as a corporation is a creature of the State. *Santa Fe Industries v. Green*, 430 U.S. 462, 479 (1977); *Cort v. Ash*, 422 U.S. 66, 84 (1975). In *Santa Fe Industries* this Court said that:

> .... Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where

> established state policies of corporate regulation would be overriden. As the Court stated in *Cort v. Ash, supra*: 'Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.' 422 U.S. at 84, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (emphasis added). *Id.* at 479.

Historically, the state of incorporation has provided general shareholder protections without regard to the residence of a shareholder. As a shareholder protection measure, the Illinois Act can properly apply to all shareholders of Chicago Rivet, an Illinois corporation. *Boehm, supra*, at 743. States have also been able to enact regulatory measures, such as state antitrust laws, that affect corporations having a substantial presence in the state. *Id.* at 744. Accordingly, the Illinois Act clearly furthers the legitimate local interest in regulating the transfer of control of an Illinois or Illinois based corporation.

The Illinois Act has an incidental effect on interstate commerce, but it does not seriously impede the ability of an offeror to proceed with a tender offer. The additional disclosure required under the Illinois Act does not impose a significant burden on an offeror. Requiring that material information be disclosed is hardly the type of burden that would impede making a tender offer. Nor do requiring a pre-offer filing, the possibility of a hearing and the longer duration of an offer constitute the type of burdens which would preclude the making of tender offers. The extraterritorial effect of the Illinois Act is an ancillary consequence of vindicating the protection of the large numbers of Chicago Rivet's shareholders who are Illinois residents.

The incidental effect of the Illinois Act on interstate commerce stands in marked contrast to the situation in *A & P Tea*

Co. v. Cottrell, 424 U.S. 366 (1976) in which the legislation had the effect of barring distribution in Mississippi of wholesome milk produced in Louisiana. Balanced against this exclusion was an asserted local interest in maintaining health standards which this Court said "borders on the frivolous." *Id.* at 375. Nor is the Illinois Act an example of parochial legislation such as in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) in which New Jersey had attempted to close its borders to the importation of out of state waste. The burdens imposed by a state attempting to regulate the length of trains or trucks constitutes a substantial obstacle to the free flow of interstate commerce in a field requiring uniformity. *Raymond Motor Transportation, supra*, 434 U.S. at 443-4; *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775-6 (1945). In *Pike* the effect of the state law would be to require the company to build an unneeded plant in Arizona, and this type of burden is "virtually per se illegal." *Pike, supra*, 397 U.S. at 145. Although the state full train crew law upheld in *Brotherhood v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 139 (1968) was a safety measure, which receives greater deference, this Court noted that the added financial burden was not such to seriously impede interstate commerce. The requirements of the Illinois Act do not impose burdens of constitutional magnitude on the making of tender offers.

In its decision the Seventh Circuit Court of Appeals said that had the Secretary of State not been enjoined over 23 million dollars of interstate commerce would have been affected. The burden of compliance with the Illinois Act, however, is not such that it would prevent the making of a tender offer. It is wrong to judge the effect of non-compliance with the Illinois Act on interstate commerce. By complying with the Illinois Act the offeror cannot proceed as rapidly and it will incur extra expense, but such incidental burdens will not deter an offeror who has made the decision to acquire another company.

The final step under the *Pike* test is to balance the benefits from the legitimate local interests against the burden imposed on interstate commerce. Illinois has a substantial interest in ensuring that its residents who are confronted with a tender offer have adequate time to make an informed decision based on complete disclosure. The potential for investors receiving a higher offer as a result of management having some time to arrange an alternative offer or if the initial offer is subsequently increased accrues to all securityholders of the target company. Expeditious initial review by the Secretary of State ensures that fraudulent or deceptive offers will be discovered at the outset. Illinois also has a substantial interest in regulating the transfer of control of an Illinois or Illinois based corporation. The only burden of compliance with the Illinois Act is the extra cost incurred by the offeror, which will not be substantial in relation to the cost of acquiring another company. Although interstate commerce could be burdened by several states applying their takeover statutes to a tender offer, the Illinois Act, as noted, contains a comity provision.

Illinois has attempted to effectuate its legitimate interests without unduly burdening the making of tender offers by carefully retaining a market approach that favors neither management nor the offeror. The incidental impact on interstate commerce cannot be reduced further and still vindicate Illinois' legitimate interest in protecting its residents. The disclosures and additional time period provided the investor under the Illinois Act ensure that the investor will not make a hasty decision and that he will benefit from any alternative offer which may result. Such benefits stemming from the Illinois Act are substantial and should not be dismissed based on speculation that offerors will be deterred, as the requirements imposed by the Act are not of a magnitude that would discourage an offeror from proceeding. Invalidating the Illinois Act would enable an offeror to freely make an offer with the maximum of surprise and speed, but at the expense of

the protection afforded the shareholder in the Illinois Act. The benefits from effectuating Illinois' compelling legitimate interests clearly outweigh the minimal burdens imposed on interstate commerce.

CONCLUSION

For the above mentioned reasons, the Appellant, James Edgar, respectfully prays that this Honorable Court reverse the decision of the Seventh Circuit Court of Appeals.

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No. 80-1188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES EDGAR,

Appellant,

v.

MITE CORPORATION AND MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

Whether this appeal is moot.

Whether the Illinois Business Take-Over Act is unconstitutional under the Commerce and Supremacy Clauses.

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No. 80-1188

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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

Appellees MITE Corporation and MITE Holdings, Inc. are corporations organized under the laws of Delaware with their principal executive offices in New Haven, Connecticut. (A-2a.)[1] MITE Holdings, Inc. is a wholly-owned subsidiary of MITE

[1] Citation to "A" refers to the Appendix filed with the Jurisdictional Statement. Citation to "JA" refers to the Joint Appendix filed with the appellant's brief.

Corporation (MITE Corporation and MITE Holdings, Inc. are collectively referred to as "MITE"). (A-2a.)

Appellant James Edgar is the Secretary of State of Illinois and is charged with the administration and enforcement of the Illinois Business Take-Over Act (Ill. Rev. Stat. ch. 121½, § 137.51 *et seq.* (1979)) (the "Illinois Act").

Chicago Rivet & Machine Co. ("Chicago Rivet"), one of the defendants below, but not a party to this appeal, is a corporation organized under the laws of Illinois with its principal executive offices in Bellwood, Illinois. (A-2a.) Chicago Rivet's common stock is traded on the American Stock Exchange. (JA-E-54.) Approximately 73% of Chicago Rivet's stockholders, holding approximately 56% of its stock, reside outside of Illinois. (A-33a.)

On January 19, 1979, MITE made the requisite filing with the Securities and Exchange Commission pursuant to Section 14(d)(1) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* (the "Exchange Act") in connection with a proposed cash tender offer for any and all shares of Chicago Rivet common stock. (JA-B-2.) The proposed offer of $28.00 per share represented a premium of approximately 15% over the market price immediately prior to the announcement of the offer. (*Id.*)

On the same day, MITE commenced this litigation in the United States District Court for the Northern District of Illinois, seeking a declaratory judgment that the Illinois Act was null and void on its face and as applied to MITE's proposed tender offer and preliminary and permanent injunctive relief prohibiting then Secretary of State Alan J. Dixon ("Dixon") and Chicago Rivet from enforcing the Illinois Act against it. (A-3a.) MITE alleged that the Illinois Act violated the Supremacy and Commerce Clauses of the United States Constitution. (A-3a.) MITE expressly stated in the proposed offer that its ability to make the offer was dependent upon the issuance of injunctive relief against the Illinois Act.[2]

---

[2] The Schedule 14D-1 filed by MITE pursuant to the Williams Act amendments to the Exchange Act with the SEC on January 19, 1979, including the proposed form of offer which is Exhibit 1 thereto, is plaintiffs' exhibit 14 in the District Court record.

Chicago Rivet responded three days later by initiating litigation in the Court of Common Pleas of Blair County, Pennsylvania, seeking to enjoin MITE from proceeding with its proposed cash tender offer on the asserted ground that MITE's offer violated the Pennsylvania Takeover Disclosure Law.[3] Chicago Rivet alleged that the Pennsylvania Act applied because Chicago Rivet had its principal place of business and substantial assets in Pennsylvania. (A-3a.) The Blair County court issued an *ex parte* order on Chicago Rivet's application, enjoining MITE from proceeding with the tender offer pending a hearing. At the same time, Chicago Rivet filed a complaint with the Pennsylvania Securities Commission, alleging the same jurisdictional basis and requesting the Commission to enforce the Pennsylvania Act against MITE. (A-4a.)

Back in the Northern District of Illinois, Chicago Rivet, representing to the court that it had no present intention of invoking the Illinois Act, moved to dismiss MITE's complaint on the ground that no case or controversy existed between the parties. (A-4a.) Appellant's predecessor, Dixon, represented to the court that he had not decided whether MITE's offer should be exempt from the Illinois Act. (A-4a.) On the strength of these representations, the District Court, on January 24, 1979, adjourned proceedings on MITE's motion for a temporary restraining order and preliminary injunction and ordered that neither Chicago Rivet nor Dixon was to initiate any action against MITE under the Illinois Act without prior notice to MITE and the court. (JA-H-2.)

Meanwhile, on January 23, 1979, MITE had removed the Pennsylvania state court action to the United States District Court for the Western District of Pennsylvania and filed its own complaint in that court seeking a declaratory judgment that the Pennsylvania Act was unconstitutional and an injunction prohibiting Chicago Rivet and the Pennsylvania Securities Commission from enforcing the Pennsylvania Act against MITE's proposed tender offer. (A-4a.) On January 31, 1979, the Pennsylvania

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[3] 70 Pa. Cons. Stat. Ann. § 71 *et seq.* (Purdon Supp. 1978) (the "Pennsylvania Act").

Securities Commission determined that it was without jurisdiction to enforce the Pennsylvania Act against MITE's proposed tender offer and on the next day the United States District Court for the Western District of Pennsylvania denied Chicago Rivet's motion for a temporary restraining order against MITE's offer. (A-35a.)

With the Pennsylvania phase of Chicago Rivet's two-front defensive battle thus brought to an unsuccessful conclusion,[4] Chicago Rivet and Dixon took immediate steps to invoke the Illinois Act. On February 1, 1979, Dixon, finding that MITE was about to violate the Illinois Act by commencing its proposed cash tender offer for Chicago Rivet without complying with the Illinois Act, ordered MITE to "cease and desist all further action to make a tender offer" for Chicago Rivet and notified MITE that this order and notice would be served on MITE on February 5, 1979. (JA-B-3.) On February 2, 1979, Chicago Rivet informed MITE that it would file suit in the Illinois state court to restrain MITE's proposed offer. (JA-B-3.)

In response, MITE renewed its request for relief against the Illinois Act. On February 2, 1979, the Illinois District Court issued a preliminary injunction restraining Dixon from enforcing the Illinois Act against MITE's tender offer for Chicago Rivet. The District Court determined that the Illinois Act was unconstitutional on its face and concluded that "the delay which will be occasioned by requiring MITE to comply with the Illinois [Act] will result in irreparable injury." (JA-I-7.) Although the order was cast as a preliminary injunction, rather than as a temporary restraining order, for the explicit purpose of assuring its immediate appealability, neither Dixon nor Chicago Rivet sought expedited review or interim relief from the Court of Appeals. (JA-I-8.)

On February 5, 1979, MITE published its tender offer in the national edition of the *Wall Street Journal*. (A-5a.) MITE's offer,

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[4] Chicago Rivet also unsuccessfully appealed the decision of the Pennsylvania Securities Commission to the Commonwealth Court of Pennsylvania. *Chicago Rivet and Machine Co.* v. *Penn. Sec. Comm'n*, No. 211 C.D. 1979 (Commw. Ct. Feb. 8, 1979).

which represented a transaction in interstate commerce in excess of $23,000,000, was made to all of the shareholders of Chicago Rivet residing throughout the United States and elsewhere. (A-5a.) On the same day, Chicago Rivet commenced an offer for approximately 40% of its own shares at $30.00 per share (JA-E-32) without the delays associated with the Illinois Act, because of the express exemption in § 2.09(4) for an issuer's acquisition of its own stock.

The District Court entered final judgment on MITE's application on February 9, 1979, declaring the Illinois Act to be null and void because it was preempted by the Williams Act amendments to the Exchange Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f), and because it created an undue burden on interstate commerce in violation of the Commerce Clause. (A-32a-41a.) The District Court also permanently enjoined enforcement of the Illinois Act against MITE in connection with its proposed tender offer. The court concluded that "[d]enial of a permanent injunction against enforcement of the Illinois Act would cause Plaintiffs irreparable injury by depriving them of their federal statutory rights, by imposing on them lengthy delays and giving undue advantage to the management of the 'target company' by using these delays to frustrate the tender offer." (A-40a.)

On February 12, 1979, MITE and Chicago reached an agreement whereby both tender offers were withdrawn and MITE was given 30 days to conduct an examination of the books and affairs of Chicago Rivet. Under the agreement MITE was either to make a tender offer at $31 per share on or before March 12, 1979, which Chicago Rivet agreed not to oppose, or would be bound under paragraph 5 of the agreement not to "acquire or make any offer to acquire any stock or assets of [Chicago] Rivet or make any offer to merge, consolidate or otherwise acquire [Chicago] Rivet." On March 2, 1979, following completion of its examination, MITE advised Chicago Rivet that it would make no offer.[5]

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[5] The agreement of February 12, 1979, being an event occurring after entry of the judgment in the District Court, is not part of the record. A copy of the agreement is set forth in Appendix A hereto.

On March 2, 1979, Dixon filed notice of appeal from the District Court judgment, which was affirmed by the Court of Appeals on October 17, 1980.

SUMMARY OF ARGUMENT

1. An actual controversy must exist at all stages of appellate review or the litigation must be dismissed as moot. *Roe* v. *Wade*, 410 U.S. 143 (1973). By agreement, MITE is precluded from ever commencing another tender offer for Chicago Rivet. The only basis for continued litigation of this case must lie in the possibility that MITE can be subjected to criminal or civil penalties for having acted in violation of the Illinois Act during a time when its enforcement had been explicitly enjoined.

If Illinois is permitted to impose civil and criminal penalties against MITE for commencing its tender offer under the protection of a federal court injunction, the injunctive relief obtained will be rendered meaningless. Moreover, subjecting MITE to penalties under these circumstances would violate well-established principles of Due Process. Because MITE cannot be proceeded against for having violated the Illinois Act, this appeal should be dismissed as moot.

2. State regulation of interstate commerce will be sustained only if it is evenhanded regulation reflecting a legitimate local interest, with an effect on interstate commerce which is only incidental, and even then only if the burden on interstate commerce is not excessive. *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). The Illinois Act meets none of these tests.

The Illinois Act is not evenhanded because it protects incumbent Illinois target management at the expense of other important relevant interests. The effect of the Illinois Act on interstate commerce is not incidental and is adverse because the Act purports to apply on a global basis and serves to delay and threaten the completion of large transactions in interstate commerce. The Illinois Act does not regulate intra-state affairs in the

permissible manner of Blue Sky laws, *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917), but is a direct attempt by Illinois to restrict transactions outside Illinois. Moreover, Illinois cannot justify the global impact of its takeover law as a regulation of the internal affairs of a corporation because a tender offer is not an internal corporate matter and the Illinois Act applies to non-Illinois corporations. The Illinois Act, which establishes a national system for regulation of tender offers, is invalid under the Commerce Clause.

3. Where a state statute prevents "the accomplishment and execution of the full purpose and objectives of Congress . . . the State law must yield to the federal." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 543 (1977). The Williams Act protects investors through a market approach whereby neutrality is preserved between the bidder and the target and the shareholder may exercise a free choice. In conflict with the market approach of the Williams Act, the Illinois Act adopts a regulatory approach requiring burdensome prenotification and potentially time-consuming administrative review with the ultimate possibility that the Secretary of State may refuse to permit the offer to be made. The Illinois Act is preempted by the Williams Act under the Supremacy Clause because it blatantly conflicts with the purposes of the federal legislation.

ARGUMENT

POINT I

This Appeal Presents No Case Or Controversy and Should Be Dismissed As Moot

MITE's tender offer for Chicago Rivet was made only after the issuance of a preliminary injunction by the District Court which restrained enforcement by Dixon of the Illinois Act. Dixon took no action to seek review of the preliminary injunction or other relief from the Court of Appeals until after the controversy between MITE and Chicago Rivet had been resolved by the agreement dated February 12, 1979 (Appendix A hereto). In

accordance with the agreement, MITE announced on March 2, 1979 that it would make no offer. MITE is precluded by the agreement from "at any time acquir[ing] or mak[ing] any offer to acquire any stock or assets of [Chicago] Rivet or mak[ing] any offer to merge, consolidate with or otherwise acquire [Chicago] Rivet." During the period between February 5, 1979, when under the protection of the District Court injunction MITE commenced its tender offer, and February 12, no stock of Chicago Rivet was purchased by MITE.

This Court's jurisdiction is dependent on the existence of a continuing case or controversy. "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe* v. *Wade*, 410 U.S. 113, 125 (1973). *See also Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974); *SEC* v. *Medical Comm. for Human Rights*, 404 U.S. 403, 407 (1972). Chicago Rivet having taken no appeal from the District Court decision (and having no possible adversary interest in doing so by virtue of the agreement of February 12, 1979 and its aftermath), the only basis for continued litigation of this case within the scope of the jurisdiction conferred by Article III must lie in the possibility that MITE can be subjected to criminal or civil penalties for having acted in violation of the Illinois Act during a time when its enforcement against MITE's tender offer had been explicitly enjoined by the District Court. The appellees submit that the necessary effect to be accorded to injunctive relief granted by federal courts, as well as more general considerations of Due Process, preclude any such punitive proceedings. Accordingly, no case or controversy is presented by this appeal and it should be dismissed as moot.[6]

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[6] In *Roe* v. *Wade* the Court found in the possibility that the plaintiff might become pregnant at a later time a "classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review'." 410 U.S. at 125. This gloss on the doctrine of mootness is inapplicable, for MITE is prohibited by its February 12, 1979 agreement with Chicago Rivet from "at any time" acquiring or offering to acquire any stock or assets of Chicago Rivet. Nor is the present case a class action, where the mootness doctrine has been applied with greater flexibility. *See United States Parole Comm'n.* v. *Geraghty*, 445 U.S. 388, 400 (1980).

A. Penalties may not be imposed for action taken under the protection of a federal court injunction.

A federal court may issue a preliminary injunction only as extraordinary relief, where there is no adequate remedy at law and the applicant for relief has demonstrated both the fact of irreparable injury if relief is not granted and a likelihood of success on the merits of the legal issue. *Brown* v. *Chote*, 411 U.S. 452, 456 (1973). The state of Illinois conceded the absence of any adequate remedy at law (JA-B-4) and the District Court made explicit findings and conclusions as to irreparable injury and the likelihood of MITE's success on the merits (JA-I-15). MITE's proposed offer had stated that MITE's ability to make the offer was dependent upon the issuance of a preliminary injunction against the Illinois Act. If Illinois is now allowed to seek criminal and civil penalties for MITE's conduct in reliance on the District Court order, the injunctive relief obtained will be rendered meaningless. A litigant in MITE's position, notwithstanding the injunction, would be forced to act completely at its peril, depending upon the eventual outcome of litigation over the legal issue. In such case, the party is no better off than if the injunction had never been issued.

The imposition of penalties for action taken in reliance on injunctive relief would run counter to decisions of this Court and other federal courts recognizing that the function of a preliminary injunction against a state statute is precisely to allow the party obtaining the injunction to act without fear of eventual prosecution. If the applicant for relief is situated "between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding," *Steffel* v. *Thompson*, 415 U.S. 452, 462 (1974), then an adequate showing of irreparable harm has been made and injunctive relief is appropriate. *See Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 500 (1925); *Terrace* v. *Thompson*, 263 U.S. 197, 216 (1923); *Salem Inn, Inc.* v. *Frank*, 501 F.2d 18, 21 (2d Cir. 1974), *aff'd in relevant part sub nom. Doran* v. *Salem*

Inn, Inc., 422 U.S. 922 (1975). If, however, action taken in reliance on the injunctive relief is not protected against subsequent criminal or civil penalties, the relief ostensibly obtained is a chimera, and the irreparable injury which formed the basis for relief remains as a threat.

Such a result would be particularly unjustified in this case. The District Court on February 2, 1979 purposely granted relief in the form of a preliminary injunction, rather than a temporary restraining order, so as to eliminate any possible issue as to its immediate appealability (JA-I-9), at the same time denying a requested stay of its order. (A-37a.) The State of Illinois, however, sought no interim relief by way of an application to the Court of Appeals[7] and did not file its notice of appeal until three weeks after entry of the District Court's final judgment granting MITE permanent injunctive relief. (JA-A-5.)

It would also be a result particularly unjustified in litigation concerning tender offers. In such a case, with time of the essence, the course of events stands in particularly striking contrast to the usual pace of constitutional litigation.[8] For this reason the consequences of delay become critical in evaluating the impact of legislation such as the Illinois Act, as we discuss below. As Judge Friendly trenchantly remarked in one of the earliest tender offer cases, "the application for a preliminary injunction is the time when relief can best be given." *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 947

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[7] In prior tender offer litigation, Judge Crowley (the District Judge below) had granted injunctive relief against enforcement of the Illinois Act, on the ground that it was unconstitutional, the Court of Appeals for the Seventh Circuit had denied interim relief, and the Circuit Justice had refused to grant a stay. *Daylin, Inc.* v. *Uarco Inc.*, No. 78C4246, Order of Preliminary Injunction (N.D. Ill. Nov. 27, 1978), *stay pending appeal denied*, Nos. 78-2487 and 78-2488 (7th Cir. Nov. 28, 1978), *stay pending appeal denied sub. nom Dixon* v. *Daylin, Inc., No. A-251 (S. Ct. Dec. 4, 1978).*

[8] The proceedings in the District Court commenced on January 19, 1979; its preliminary injunction issued February 2, 1979; MITE and Chicago Rivet came to agreement on February 12, and concluded their relations with MITE's decision on March 2, 1979 to make no offer. The appeal to the Seventh Circuit, taken on March 2, 1979, was heard on November 9, 1979, and decision of the appeal was announced October 17, 1980. Probable jurisdiction was noted by this Court on May 4, 1981.

(2d Cir. 1969). In the situation posed by a tender offer, where the ability to act without artificial delay may be the deciding factor in the outcome of the offer, the right to rely on a preliminary injunction, so long as it is unstayed and unreversed, is of particular importance. The Court should not endorse a result which would render that reliance impossible.

B. Due Process considerations preclude the imposition of criminal or civil penalties for action taken in reliance on judicial pronouncements as to the validity of state statutes.

In a variety of contexts courts have recognized that Due Process considerations create a valid defense to criminal prosecution for acts taken in reasonable reliance upon judicial or administrative pronouncements. The present case, where MITE's action was taken in reliance upon an injunction obtained by MITE itself, clearly presents the strongest instance for recognition of such a defense.

In *Marks* v. *United States*, 430 U.S. 188 (1977), defendants were convicted in the lower court for transporting material which, while not obscene under the definition of obscenity which prevailed at the time of the act, was rendered obscene at the time of trial by an intervening decision of this Court. The Court held that Due Process mandated reversal of the conviction, stating that it "is fundamental to our concept of constitutional liberty" that a person "have fair warning of that conduct which will give rise to criminal penalties." 430 U.S. at 191. *See also Cox* v. *Louisiana*, 379 U.S. 559 (1965) (conviction for illegal picketing reversed because defendant had relied on permission from police officer); *Raley* v. *Ohio*, 360 U.S. 423 (1959) (conviction for refusal to testify before state commission reversed because witness had relied on opinion of commission chairman that he was privileged to remain silent).

In *United States* v. *Mancuso*, 139 F.2d 90 (3d Cir. 1943), defendant had obtained an *ex parte* order staying his induction

which was subsequently vacated. Nonetheless, the court held that he could not be held liable for ignoring induction notices which were issued while the order stood. Notwithstanding that the order was "erroneous," the court stated that liability cannot attach if

> the litigant does something . . . while under protection of a court order. . . . Until the order was vacated . . . it stood and the litigant can hardly be asked to determine at his peril the correctness of the court's decision. Appellate courts are provided for that purpose and the rule is well established that an initial decision stands until reversed or until vacated. . . .

139 F.2d at 92. *See also United States* v. *Barker*, 546 F.2d 940, 954-57 (D.C. Cir. 1976); *Kratz* v. *Kratz*, 477 F. Supp. 463, 480-83 (E.D. Pa. 1979); *United States* v. *Ehrlichman*, 376 F. Supp. 29, 35 (D. D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977).

In this case injunctive relief was sought and obtained for the specific purpose of enabling MITE to commence a tender offer without risk of prosecution under the Illinois Act. It would not be consonant with considerations of Due Process if action taken in reliance thereon were subject to subsequent criminal prosecution or civil penalties.[9] Yet without that possibility the appeal presents no current case or controversy and should be dismissed as moot.

POINT II

The Illinois Act Is Unconstitutional Under The Commerce Clause

State regulation that unduly burdens interstate commerce has been invalidated since Chief Justice Marshall's decision in

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[9] It should also be noted that the Illinois criminal code itself provides that there can be no criminal liability for actions taken "in reliance upon an order or opinion of . . . a United States appellate court later overruled or reversed. . . ." Illinois Rev. Stat. ch. 38, § 4-8(b) (1979). This statute has been

footnote continued

Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), affirming the supremacy of the national power under the Commerce Clause where it conflicts with state law.[10] Even where state regulation which affects interstate commerce is not automatically excluded by a federal statute, it will be sustained, under the test most recently formulated by this Court, only if it is an evenhanded regulation reflecting a legitimate local interest, with an effect on interstate commerce which is only incidental and even then only if the burden on interstate commerce is not clearly excessive.[11]

The Illinois Act meets none of these tests. As we shall show, it is not evenhanded, but, on the contrary, protective of incumbent Illinois corporate management against other relevant interests. The Act is not local legislation with merely incidental effects on interstate commerce; on the contrary, its global effect is apparently an indispensable and intended consequence. Its adverse effect on interstate commerce is the assertion of the power to thwart nationwide transactions, in which non-Illinois contacts may predominate. The Illinois Act stands, in short, as a national regulation of an aspect of interstate commerce in securities which is also governed, under different requirements, by federal law. Indeed, the Illinois Act appears to have been enacted in part precisely in order to impose requirements specifically rejected by Congress.

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liberally read. *See People* v. *Dean*, 73 Ill. App.3d 501, 392 N.E.2d 57 (1979). The Illinois court's emphasis on the "spirit of the rule of the statutory defense of reliance," *id.* at 503, 392 N.E.2d at 59, suggests that the statute would be held to bar prosecution in the instant case where the Seventh Circuit has affirmed the District Court's grant of injunctive relief, even if this Court were to reverse the judgment of the Court of Appeals.

[10] The Court struck down New York's attempt to enforce a monopoly on steam navigation on the waters of New York granted by the state against a holder of a federal license to engage in coastwise shipping.

[11] *See Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978) (quoting *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Appellant suggests that the decision of the Court of Appeals affirming the unconstitutionality of the Illinois Act as violative of the Commerce Clause overlooks a justification of the law as a legitimate regulation of internal corporate affairs. Appellant's Br. at 25-27. As we shall show, the Act can be sustained neither by this internal affairs argument nor by appeal to the recognition of state securities regulations which are not inconsistent with federal law contained in section 28(a) of the Exchange Act, 15 U.S.C. § 78bb(a).

A. The Illinois Act is not evenhanded.

The Illinois Act can be described as "evenhanded" only in the sense that it prohibits a shareholder not an Illinois resident from accepting an offer in the same way in which it prohibits acceptance of the offer by an Illinois shareholder. Its effect as a protection for incumbent Illinois corporate management, in contrast to other important and relevant interests (economic efficiency, freedom of shareholder choice, the efficiency of the national securities markets and the interests of other states and their residents), is manifest.[12] The Illinois Act purports to protect the interests of Illinois securityholders, but by its terms it applies even if there are no shareholders in Illinois.[13]

The Illinois Act imposes a precommencement period of notification, which has been widely recognized as important to the defense against a tender offer. *See Kennecott Corp.* v. *Smith*, 637 F.2d 181, 188-89 (3d Cir. 1980); *Great Western United*

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[12] Neither the Court of Appeals here, 633 F.2d at 500-01, nor the Fifth Circuit in *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1279 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979), thought it appropriate to probe state legislative motivation. We, likewise, see no need to do so.

[13] The Illinois Act applies to offers for stock of a "target company," defined in § 2-10 of the Illinois Act (A-48a) in several alternative ways. The definition is satisfied whether or not there are any Illinois shareholders, if the company is organized under Illinois law and has its principal executive office in Illinois or if either one of those tests is met and 10% of its capital and surplus are "represented" in Illinois.

Corp. v. *Kidwell*, 577 F.2d at 1279. It allows the "outside" directors of the target to require the Secretary of State to hold a hearing on the merits of the offer under procedures which impose no time limit on the conduct of the hearing itself.[14] It completely exempts from coverage a corporation's acquisition of its own stock. Illinois Act § 2.09(4). Thus, Chicago Rivet was able to mount a competing partial tender offer for its own stock, without compliance with the Illinois Act, to frustrate MITE's offer. In respect of that offer, the shareholders of Chicago Rivet were left to depend only on the disclosures and other procedures required by federal law, which the appellant would have this Court believe Illinois viewed as inadequate to protect investors. This statutory distinction is at variance with Illinois' asserted legislative purpose and bears heavily on the claim that the Illinois Act shares with the Williams Act the objective of "investor protection."

B. The effect of the Illinois Act on interstate commerce is not "incidental" but, on the contrary, significant and purposeful.

A characteristic of the Illinois Act and others like it that has been much noted[15] is that they are global in scope. A tender offer subject to the Illinois Act may not commence anywhere in the world unless it may commence in Illinois. This is in sharp contrast with the Illinois Blue Sky law, which regulates only offers to Illinois residents.[16]

This distinction between the coverage of the two statutes is obviously purposeful, and although the State of Illinois does not

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[14] Section 7 of the Illinois Act (A-53a) provides that the hearing must begin within 15 business days of the request, and that a decision must be reached within 15 business days of the conclusion of the hearing. (A-53a-54a.)

[15] *See, e.g.*, E. Aranow, H. Einhorn & G. Berlstein, *Developments in Tender Offers for Corporate Control* 231 (1977); Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U. L. Rev. 872, 929 (1978); Langevoort, *State Tender-Offer Legislation: Interests, Effects and Political Competency*, 62 Cornell L. Q. 213, 219-20 (1977).

[16] *See* Ill. Rev. Stat. ch. 121½, § 137.5 (1975).

discuss the point, it is candidly stated in the *amicus* brief of the North American Securities Administrators Association, Inc., as it is in the literature,[17] that global regulation is indispensable to the effective regulation of tender offers. The *amicus* brief asserts that "[w]ithout the extraterritorial effect of the state action to stop the entire takeover bid, the takeover could be completed and control of the corporation shifted to the detriment of Illinois and its shareholders. An injunction which was limited in its scope to restraining the takeover bid within the borders of Illinois would be ineffective." (NASAA *amicus* Br. at 26-27.) This proposition that a cash tender offer cannot effectively be regulated by state legislation which has a "merely incidental" effect on interstate commerce deprives the Illinois Act of possible justification under the accepted tests.[18] On the contrary, it is to Congress, not state legislatures, that the Commerce Clause assigns the power to regulate, where only nationwide regulation can be effective. A state cannot claim that it has an interest in protecting non-residents and in regulating transactions that take place outside the state. *Cf. Baldwin* v. *Seelig, Inc.*, 294 U.S. 511, 521 (1935) ("New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.").

C. The effect on interstate commerce is adverse.

The parties stipulated and the District Court found that MITE's proposed tender offer represented a transaction in interstate commerce of approximately $23 million. (JA-B-3; A-34a.) The threat posed by the Illinois Act to completion of an offer, or to the substantial delay of it, is palpable. The courts below properly accepted delay as an important and possibly

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[17] *See, e.g.*, E. Aranow & H. Einhorn, *Tender Offers for Corporate Control* 157 (1973); Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L. J. 510, 515 (1979).

[18] The Court of Appeals left open the possibility of a valid state takeover statute, 633 F.2d at 503, and it may be that a tender offer law, which, like Blue Sky laws, applied only locally, would be valid, so far as its jurisdictional sweep was concerned.

decisive factor in the outcome of a tender offer. And beyond the simple fact of delay is the assertion by the State in the hearings provision of the right to prohibit the offer everywhere if the Secretary of State should find that the offer "fails to provide full and fair disclosure" or "is inequitable" or "would work or tend to work a fraud or deceit."[19] Illinois Act § 7(E)(A-54a).

Still further adverse consequences to interstate commerce arise from the possibility of a conflict of jurisdictions, which laws like the Illinois Act threaten, given the ingenuity and energy of incumbent management acting in its own defense. That this is no mere theoretical argument is vividly illustrated by this case. Chicago Rivet sought to portray itself as a corporation with its center of gravity in Pennsylvania and brought suit in Pennsylvania state court and applied for relief to the Pennsylvania Securities Commission. Chicago Rivet was permitted to open this second front because the Pennsylvania Act is not confined in application to corporations organized under Pennsylvania law.[20] In this respect it is similar to the Illinois Act which also applies much more broadly than merely to Illinois corporations.[21] Indeed, the Illinois Act applies even if the target corporation is neither incorporated nor headquartered in Illinois, provided only that more than 10% of its outstanding securities are held by Illinois residents.

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[19] Appellant argues that the ability to declare an offer "inequitable" does not empower the Secretary to pass on the substantive fairness of the offer. The appellant's assertion is clearly inconsistent with the plain meaning of the term "inequitable." Moreover, in the Court of Appeals appellant took an inconsistent position and defended its power to ascertain the fairness of an offer stating "allowing for review by a neutral state administrator while the securityholders have time to consider the offer" will not result in unnecessary delay. 633 F.2d at 493 (quoting Appellant's Br. at 17). The Court of Appeals rejected this argument because "Illinois' substitution of the judgment of its Secretary of State for an investor's own assessment of the equitability of a tender offer is patently inconsistent with the Williams Act." *Id.* at 494.

[20] In *Crane Co.* v. *Lam*, 509 F. Supp. 782, 790 (E.D. Pa. 1981), the court, in striking down the Pennsylvania Act under the Supremacy and Commerce Clauses, noted the "burden on interstate commerce" from "the serious danger of conflict with other states' tender offer statutes."

[21] This, of course, has devastating consequences for the belated and labored argument that the Illinois Act is properly viewed merely as a regulation of corporate "internal affairs." *See* pp. 20-23 *infra*.

These overlapping assertions of jurisdiction are important from several perspectives. They threaten a kind of Balkanization which, from the earliest days, the Commerce Clause has served to prevent.[22] Moreover, to the extent that a state or its residents may have a legitimate interest in a tender offer, even if the state is not the place of incorporation or the number of resident shareholders is less than a majority, assertions of jurisdiction with global application go too far. Where a transaction has substantial contacts with two or more states, as will be true of any tender for stock of a widely held public corporation,[23] where the subject matter, national securities transactions, has been regulated by Congress just short of a half century, and where the particular form of transaction, a cash tender offer, is the specific subject of congressional action, the case for invalidation of a state statute such as the Illinois Act, which asserts a right of worldwide regulation, is overwhelming.

D. The constitutionality of Blue Sky laws and the accommodation of federal securities regulation with Blue Sky laws does not sustain the Illinois Act.

One of the two grounds on which the defense of state takeover statutes such as the Illinois Act is usually put is the contention that they are simply a variant of state securities regulation, long ago held to be constitutional, with which national regulation of securities is fully consistent as evidenced by the explicit protection of state securities regulation accorded by section 28(a) of the Exchange Act. This argument overlooks the fact that the constitutional decisions and the national/state legislative accommodation reflected in section 28(a), which it should be noted preserves state jurisdiction only "insofar as it does not conflict" with federal legislation, relate to the state Blue Sky laws which

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[22] *See, e.g., Hughes* v. *Oklahoma*, 441 U.S. 322, 325-26 (1979); *H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 530-34 (1949); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) at 86-87.

[23] As a practical matter, a contested tender offer can be successfully contemplated only if stock of the target corporation in question is widely held.

constitute much more modest assertions of state power, with a truly "merely incidental" effect on interstate commerce. *See* Langevoort, *supra* note 15, at 214-16. The contrast in this respect between the Illinois Act and the Illinois Blue Sky law has already been noted. *See* p. 15 n.16 *supra*.

The principal case decided by this Court concerning the constitutionality of state Blue Sky laws under the Commerce Clause is *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917).[24] The decision emphasizes the point which so sharply distinguishes the Illinois Blue Sky law from the Illinois Act, the carefully limited local impact of the Blue Sky laws.

> The provisions of the law, it will be observed, apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed (§§ 6373-9), they are only affected by the requirement of a license of one who deals in them *within* the State. Upon their transportation into the State there is no impediment—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so and this only that they may not appear in false character and impose an appearance of a value which they may not possess—and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. . . . Such regulations affect interstate commerce in them only incidentally.

242 U.S. at 557-58 (citations omitted; emphasis in original). The Ohio law at issue in *Hall* did not prohibit or restrict transactions outside Ohio, and did not even prohibit the initial sale of securities to an Ohio dealer or the importation of the securities into the state, but was aimed at the offer for public sale of securities in Ohio by an unlicensed dealer. Thus, the Court was

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[24] Two companion cases relied on *Hall* on the Commerce Clause point. *See Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U.S. 559, 567-68 (1917) (South Dakota statute); *Merrick* v. *N.W. Halsey & Co.*, 242 U.S. 568, 584 (1917) (Michigan statute).

readily able to conclude that the interstate character of securities that come into the State "is only incidentally affected by the statute." *Id.* at 559. In all these respects, the contrast with the sweep of the Illinois Act could not be more pointed.

It is these limited Blue Sky statutes, in existence for many years, that section 28(a) explicitly acknowledges. *See* I L. Loss, *Securities Regulation* 30-31 (2d ed. 1961). The jurisdiction preserved in section 28(a) is that "of State security commissions to regulate transactions within their own borders." H.R. Rep. No. 85, 73d Cong., 1st Sess. 10 (1933).[25] Section 28(a), of course, long antedates the far wider assertion of state jurisdiction reflected in state laws such as the Illinois Act, which can claim no legitimacy from section 28(a).[26]

E. The Illinois Act cannot be sustained as merely a regulation of the internal affairs of a corporation.

The second principal justification now claimed for statutes like the Illinois Act against a Commerce Clause challenge is that they are merely regulations of the internal affairs of a corporation. *See* Appellant's Br. at 25-27; NASAA *amicus* Br. at 19-26; New York *amicus* Br. at 14-17; Ohio *amicus* Br. at 12-16. The "internal affairs" argument has at least the merit of recognizing that statutes like the Illinois Act cannot plausibly be said to have

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[25] The legislative history of § 28(a) indicates, as does the text, that it was merely intended to express the principles of the Supremacy Clause. *See Stock Exchange Practices: Hearings on S. Res. 84 (72d Cong.), S. Res. 56 and S. Res. 97 (73d Cong.) Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 6577 (1934) (remarks of Thomas Corcoran). *Accord, Great Western United Corp.* v. *Kidwell*, 577 F.2d at 1276.

[26] Nor does the failure of the Williams Act to deal explicitly with state tender offer laws constitute express or implied congressional approval of them. The Williams Act was the result of legislative efforts between 1966 and 1968, and at its enactment on July 29, 1968, only Virginia had adopted a tender offer law. Virginia's statute, Va. Code 13.1-528 (Va. Acts 1968, ch. 119) became effective on March 5, 1968. There is no evidence in the legislative history of the Williams Act that Congress was aware of Virginia's takeover act. For a recent survey of state takeover laws see Shapiro, *State Takeover Laws*, in Practicing Law Institute, Twelfth Annual Institute on Securities Regulation 401-442 (1980).

the requisite "merely incidental" effect on interstate commerce. It fails, however, for two substantial reasons: the Illinois Act is not confined to corporations whose "internal affairs" are subject to Illinois regulation, and a tender offer, in any event, is not a matter of internal corporate affairs.

The impact on interstate commerce of state regulation of internal corporate governance is, of course, extensive. The acceptance of it, so far as Commerce Clause analysis is concerned, is in large part pragmatic.[27] There is no general federal substantive law of corporations, and predictability, consistency and fairness require that questions of corporate governance generally be regulated by one law, not many, and that that one law be known.[28] Thus, as a general proposition, matters of the "internal affairs" of a corporation are referred to the law of the state under which the corporation was organized.

The Illinois Act is neither in stated purpose nor in operation a statute which is intended to govern the internal affairs of corporations subject to Illinois regulation. On the contrary, the very different stated purpose of the Illinois Act is "to protect the interests of Illinois securityholders of companies having a close connection with this State without unduly impeding takeover offers. . . ." (A-45a.) Nor is regulation of internal corporate affairs the effect of the Illinois Act. It does not, for example, even apply to all Illinois-chartered corporations, but only to those that have either their principal executive office in Illinois or at least 10% of their stated capital and paid-in surplus represented in Illinois. (A-48a.) Moreover, any corporation with

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[27] *See* Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 Colum. L. Rev. 1118, 1124-26 (1958).

[28] *See* Restatement (Second) of Conflict of Laws § 302, Comment e (1971), which, in the context of questions relating to corporate governance, states that "application of the local law of the state of incorporation will usually be supported by those choice-of-law factors favoring the needs of the interstate and international systems, certainty, predictability and uniformity of result, protection of the justified expectations of the parties and ease in the application of law. . . ." *See generally* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case Western Reserve L. Rev. 722, 742-45 (1970).

10% or more of its stock held by Illinois shareholders of record is subject to the Act, as is a corporation with executive offices and 10% of capital and surplus in Illinois, even if incorporated elsewhere. It is neither sufficient nor legitimate analysis to view the Illinois Act as a regulation of corporate internal affairs merely because there is some overlap between the companies subject to the Illinois Act and the category of companies whose corporate affairs are by constitutional convention subject to regulation by Illinois.[29]

The second defect in the "internal affairs" argument is that a tender offer is not an internal corporate transaction. Literally, of course, it is an offer to purchase the shares held by an existing shareholder, and if accepted, results in a purchase. Offers to purchase and purchases of corporate stock are an everyday occurrence and are not classified as an aspect of internal corporate affairs. After becoming a stockholder, the buyer may participate in matters of internal corporate affairs, such as stockholder meetings, and stockholders, if numerous enough and united in purpose, can effect major changes in corporate affairs. That such events may follow from the purchase of stock does not, however, transform the original purchase into a transaction which itself was a matter of internal corporate affairs.[30] A tender offer cannot be treated as an internal corporate matter without a misuse of terminology. Just as constitutional infirmity "is not to be avoided by 'simply invoking the convenient apologetics of the police power . . . '," *Southern Pacific Co.* v. *Arizona*, 325

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[29] The Court is not bound by "[t]he name, description or characterization given" the Illinois Act by the Illinois legislature but may "determine for itself the practical impact of the law." *Hughes* v. *Oklahoma*, 441 U.S. at 336.

[30] [A] tender offer involves the sale of securities from one shareholder to another, not a change in the corporation itself. The voting rights of shares and the legal relationship between a corporation and its shareholders does not change because of a tender offer.

Great Western United Corp. v. *Kidwell*, 577 F.2d at 1280 n.53. *See also* Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1, 16-17 (1976); Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. Cal. L. Rev. 1133, 1153-55 (1974).

U.S. 761, 780 (1945), so it is not to be avoided by mechanical recitation of the talismanic phrase "internal corporate affairs."

F. The Illinois Act constitutes a scheme for national regulation of tender offers in competition with that enacted by Congress.

The specific conflicts between the Illinois Act and the Williams Act require the conclusion, set forth in Point III, that the Illinois Act is invalid on Supremacy Clause preemption grounds. There is therefore no occasion to elaborate the point, particularly relevant to Commerce Clause analysis,[31] that the Illinois Act, because of its extraordinary global reach, represents a truly national (indeed, international[32]) system for regulation of those tender offers to which it applies. The Secretary of State, in whom administration of the Illinois Act is reposed, "may accept," but thus evidently need not, in lieu of the registration statement required by the Illinois Act, a "form or other filing required by a federal . . . agency" but only if it is one "which the Secretary has determined . . . to encompass disclosure requirements substantially equivalent" to those required by the Illinois Act. (A-52a.) Even though a particular tender offer has met Williams Act disclosure requirements and would be able to be made so far as federal law is concerned, the Secretary may prohibit its being made if he "finds that the take-over offer fails to provide full and fair disclosure to the offerees of all material information . . . or that the take-over offer is inequitable . . . ." (A-54a.) Thus MITE, a Delaware corporation, with its executive office in New Haven, Connecticut and manufacturing facilities in Connecticut and Indiana (JA-C-3), may be prohibited by the Illinois Secretary of State from making an offer to a person residing anywhere

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[31] *See, e.g., Baldwin* v. *Seelig, Inc.*, 294 U.S. at 511.

[32] It is clear that the Illinois Act prohibits an offer by MITE to a Chicago Rivet stockholder residing in Canada (or Mexico or wherever) unless the Illinois Act is complied with. The Illinois Act requires that an offer be made on the same terms to Illinois shareholders as other stockholders. An offeror precluded from purchasing shares in Illinois thus could not make an offer to Canadian shareholders without violating the Illinois Act.

in the world. This is truly an empire within an empire, a jurisdictional sweep hardly, if ever, before asserted by a State as justified under the Commerce Clause.[33] A decision sustaining the Illinois Act has the gravest implications for the powers of the national government in respect to matters which, if contentions made in support of the appellant are accurate, can only be effectively regulated on a national basis, as the Congress has plainly attempted to do in the Williams Act.

POINT III

The Illinois Act Is Preempted By The Williams Act

The Illinois Act is preempted by the Supremacy Clause because it conflicts with the purposes and effects intended by Congress in the Williams Act. Congress enacted the Williams Act to protect shareholders by mandating various timing and disclosure provisions and by taking care not to discourage the use of the tender offer device for corporate acquisitions. To achieve a neutral balance in the Williams Act which favored neither an offeror nor target management, Congress adopted a "market approach" which requires the disclosure of material information but leaves to the shareholders the decision whether or not to tender their stock. The Williams Act protects the shareholder by providing him with material information and then letting him determine whether the offer is in his own best interests.

In contrast, the Illinois Act utilizes a "regulatory approach," whereby burdensome prenotification and administrative requirements serve to delay the offer and substitute the judgment of an Illinois administrator for that of the public shareholders, even if,

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[33] In the usual case in which state legislation has been invalidated in this Court because it is in violation of the Commerce Clause, the legislation under attack has been at least ostensibly directed at regulation of purely local matters. *See, e.g., Kassel* v. *Consolidated Freightways Corp.*, ___ U.S. ___, 49 U.S.L.W. 4328 (March 24, 1981) (truck length); *Southern Pacific Co.* v. *Arizona*, 325 U.S. at 761 (train length); *South Carolina State Highway Dep't* v. *Barnwell Brothers, Inc.*, 303 U.S. 177 (1938) (truck mud flaps). Here, however, the Illinois Act overtly asserts the right to regulate transactions outside Illinois conducted between non-residents of the state.

as in this case, most of them do not reside in Illinois.[34] The primary beneficiary of the Illinois Act is incumbent management of the target company which obtains an opportunity to delay and defeat a proposed tender offer. The Illinois Act impedes realization of the purpose of the Williams Act and is therefore invalid under the Supremacy Clause.

A. The Williams Act protects investors through a market approach.

The Williams Act was enacted to close the gap in the disclosure requirements of the federal securities laws by bringing cash tender offers, which were previously unregulated, within the ambit of federal securities legislation. *See Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 22 (1977). The dominant theme of the Williams Act, as this Court has noted, is the protection of investors. *Id.* at 28. This protection is achieved under the Williams Act through a "market approach," whereby "the offeror and the incumbent managers of a target company . . . present fully their arguments and then . . . *let the investor decide for himself.*" *Great Western United Corp.* v. *Kidwell*, 577 F.2d at 1276 (emphasis added). The Williams Act operates "to ensure that full information is conveyed to the shareholders of a target company as soon as possible, so that they may exercise a knowledgeable and an unfettered choice." *Kennecott Corp.* v. *Smith*, 637 F.2d at 187-88. As the Seventh Circuit stated in this case, "Congress contemplated only that investors be protected from acting in ignorance, not from their own well informed choice." 633 F.2d at 494.

The Williams Act imposes three basic requirements in order to effectuate its purposes:

(i) An offeror must file a Schedule 14D-1 with the SEC and publish certain information required by the SEC upon commencing the offer. 15 U.S.C. § 78n(d)(1).

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[34] As noted above, because Chicago Rivet is an Illinois corporation with its executive office in Illinois (A-28a) the Illinois Act would apply even if *no* holders of its stock resided in Illinois. (A-48a.) In actual fact, approximately 27% of Chicago Rivet's shareholders were Illinois residents. (A-33a.)

(ii) A tender offer for any and all shares, as in the case of MITE's offer, must remain open for seven days (ten days in the case of an offer for less than all shares) during which a shareholder may withdraw any shares he has tendered.[35] 15 U.S.C. §§ 78n(d)(5), 78n(d)(6).

(iii) All shares which the offeror purchases must be purchased upon the same terms and for the same price.[36] 15 U.S.C. § 78n(d)(7).

In enacting the Williams Act, Congress attempted "to preserve a balance between incumbent management and the offeror so that neither group has an undue advantage." *Kennecott Corp.* v. *Smith*, 637 F.2d at 188. The balance struck requires disclosure by the offeror to inform shareholders, but within a procedural framework that does not discourage tender offers, so that the investors do not lose the benefit of such offers.[37] This

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[35] The SEC, subsequent to the commencement of MITE's tender offer, adopted rules mandating that an offer remain open for 20 business days from commencement, 17 C.F.R. § 240.14e-1 (1980), and that withdrawal rights must extend for 15 business days from commencement, 17 C.F.R. § 240.14d-7 (1980). Because these rules do not apply to tender offers made prior to their effective date, they are not applicable to this case. 44 Fed. Reg. 70326 (1979).

[36] The SEC has recently promulgated additional rules pursuant to the Williams Act, such as the requirement that an offer must be commenced or abandoned no later than five business days after public announcement of the material terms of the offer. 17 C.F.R. § 240.14d-2(b)(1980).

[37] The legislative history of the Williams Act makes it clear that the intention of Congress was to preserve a policy of legislative neutrality in tender offers. The following dialogue is illustrative:

> MR. JAVITS. One other question I should like to ask the Senator: There is no intendment in the measure, or in the fact that the measure is offered, to in any way condemn the practice of making tenders, is there? Sometimes stockholders do very well because of tenders, especially competitive tenders.
>
> MR. WILLIAMS of New Jersey. There is no intention in any way to prohibit tender offers. As a matter of fact, I think it might encourage them. Through this legislation, people will have more information, and will be able to intelligently decide whether to accept a tender offer and sell their shares to a group which may wish to obtain a controlling interest.

113 Cong. Rec. 24665 (1967).

Senator Javits also later remarked in the same discussion:

> I gather that the point of the Senator from New Jersey [Senator Williams] and the Senator from California [Senator Kuchel] is that this is at least a beginning in keeping up with getting adequate representation

footnote continued.

Court, in *Rondeau* v. *Mosinee Paper Corporation*, 422 U.S. 49, 58-59 (1975), noted this intention of Congress in enacting the Williams Act:

> The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party. By requiring disclosure of information to the target corporation as well as to the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen commented upon the "extreme care" which was taken "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968). See also *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 947 (CA2 1969).

The Williams Act effectuates the congressional purpose of aiding investors by requiring the dissemination of material information to the market and assuring investors that they, and not target management or an administrator, determine the ultimate success of an offer.

B. The Illinois Act's regulatory approach conflicts with the Williams Act.

In conflict with the market approach of the Williams Act, the Illinois Act adopts a regulatory approach requiring burdensome

and adequate information on the part of the stockholder, who could conceivably be imposed upon, without denying him the opportunities which result from the competitive bidding for a block of stock of a given company.

113 Cong. Rec. 24665-66 (1967).

prenotification and potentially time-consuming administrative review with the ultimate possibility that the Illinois Secretary of State may refuse to permit the offer to be made. The Illinois Act obstructs tender offers in three principal ways:

(i) The Illinois Act requires a twenty-business-day prenotification. Illinois Act § 4. Section 14(d) of the Williams Act contains no prenotification requirement. Indeed, Congress rejected prenotification proposals both during its consideration of the Williams Act and after its enactment.[38]

(ii) If a hearing is called, the Illinois Act prevents a tender offer from being made until the hearing has been completed. A

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[38] In 1965, Congress rejected a proposed twenty-day prenotification requirement. *See* 111 Cong. Rec. 28257-28259 (1965). In 1967, Congress rejected a five-day prenotification requirement. Senate Comm. on Banking and Currency, Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids, S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967); *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Sec. of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 72-75, 87-89, 98, 105, 139-40, 151, 163, 245 (1967); *Takeover Bids: Hearings on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 44-46, 50-54 (1968). In 1970, Congress rejected yet another prenotification proposal. *See Investor Protection in Corporate Takeovers: Hearings on H.R. 4285, S. 3431 and S. 336 Before the House Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 6-7 (1970).

This prenotification requirement also directly conflicts with the SEC's subsequently adopted Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (1980), which requires that an offer commence within five business days of the announcement of the material terms of the offer. *See, e.g., Kennecott Corp.* v. *Smith*, 637 F.2d at 182, *after remand*, 507 F. Supp. 1206 (D. N.J.), *appeal pending*, No. 81-1679 (3d Cir. filed April 1, 1981); *Canadian Pacific Enterprises (U.S.) Inc.* v. *Krouse*, 506 F. Supp. 1192 (S.D. Ohio Jan. 13, 1981), *appeal pending*, No. 81-3083 (6th Cir. 1981); *Joseph E. Seagram & Sons, Inc.* v. *Marley*, No. 81-869-W (W.D. Okla. July 17, 1981); *Crane Co.* v. *Lam*, 509 F. Supp. at 1182; *Natomas Co.* v. *Bryan*, 512 F. Supp. 191 (1981); *Eure* v. *Grand Metropolitan Ltd.*, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,694 (N.C. Super. Ct. April 18, 1980); *Hi-Shear Ind., Inc.* v. *Campbell*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,804 (D.S.C. Dec. 4, 1980); *Hi-Shear Ind., Inc.* v. *Neiditz*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,805 (D. Conn. Dec. 16, 1980). Rule 14d-2(b) illustrates a federal policy in favor of the prompt dissemination of tender offer materials. The Seventh Circuit did not base its finding of preemption on the new rules because these rules do not apply to tender offers made prior to their effective date. 44 Fed. Reg. 70326 (1979).

majority of the "outside" directors of a target company can demand a hearing. The directors need not act until fifteen business days after a registration statement is filed. Illinois Act § 7(A). The Secretary of State is required to call a hearing within ten business days, or approximately two weeks after such a demand, but the Secretary has discretion to extend the date for starting the hearing (Illinois Act § 7(C)), and there is no time limit whatever as to the duration of the hearing. The Secretary is required to rule within fifteen business days, or approximately three weeks after the conclusion of the hearing, but this time, too, may be extended by the Secretary. Illinois Act § 7(D). In contrast, the Williams Act does not contemplate or require any hearings. The hearing provisions of the Illinois Act directly contravene the Williams Act by forestalling shareholders' exercise of judgment in the marketplace.

(iii) The Illinois Act authorizes the Secretary to deny the registration of the offer or condition its registration upon certain changes or modifications if he finds that the takeover offer fails to provide full and fair disclosure or that the takeover offer is inequitable or would work or tend to work a fraud or deceit on offerees. Illinois Act § 7(E). By allowing the Secretary to pass upon the substantive fairness of a tender offer and to prohibit it from going forward, if, in his sole opinion, the offer is "inequitable," the Illinois Act directly conflicts with the market approach of the Williams Act.[39]

C. The Williams Act preempts the Illinois Act.

The Supremacy Clause will serve to invalidate state statutes which conflict with the express provisions or the clear purpose of

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[39] The Illinois Act also requires more extensive disclosure by an offeror than does the Williams Act. *Compare* Illinois Act § 4 and § 9(D) (1976) *with* 15 U.S.C. § 78n(d) (1976) *and* 17 C.F.R. § 240.14d-8 (1980). It has been noted that these extensive further disclosures required of a tender offeror do not assist the shareholder in making the key economic evaluation, which is to assess the price offered in relation to the value of the target company under current management. This is information much more likely to be in the possession of target management than the offeror. Yet the Illinois Act exempts incumbent management from its provisions even when, as here, the target makes a counter-offer for its own stock. Illinois Act § 2.09(4). *See* Langevoort, *supra* note 15, at 238-39.

federal law. Where a state statute prevents "the accomplishment and execution of the full purposes and objectives of Congress . . . the state law must yield to the federal." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 543 (1977). *See also Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Appellant argues that the Illinois Act does not conflict with the Williams Act because both statutes protect investors. To support its argument, appellant asserts that "[t]he overriding theme of the Williams Act is that of protecting the investor as opposed to undertaking a definitive balancing of the position of the offeror versus that of target company management." Appellant's Br. at 16. This argument misconstrues the purpose of the Williams Act and the congressional scheme for implementing it.

Congress enacted the Williams Act to protect shareholders by requiring the disclosure of material information and by preserving a balance between the offeror and incumbent management. It cannot be said that the purpose was solely to protect shareholders without examining the means by which the purpose was to be accomplished. As the Third Circuit observed in *Kennecott Corp.* v. *Smith*, 637 F.2d at 188: "The Act is also designed to preserve a balance between incumbent management and challenging groups, so that neither has an undue advantage." *See also Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. at 58-59; *Great Western United Corp.* v. *Kidwell*, 577 F.2d at 1277; S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967); 113 Cong. Rec. 854 (1967) (statement of Senator Williams). By preserving this balance, the Williams Act protects shareholders from the excesses both of incumbent management and the offeror. As the Seventh Circuit noted in this case:

> [I]nhibitions on tipping the regulatory balance, particularly on tilting toward incumbent management, are important because maintenance of an equitable balance between the contending sides is perceived as a principal means of investor protection. For if the weapons in management's arsenal are drastically augmented, the vigor of the tender offer device will at

> some point be impaired, denying protection to stockholders in an obvious dimension: the right to tender their shares at a premium. Thus, in its concern for investors, Congress was necessarily committed to maintaining, where appropriate, the basic capability of offerors to make successful tender offers (as well as, of course, maintaining the free flow of information to stockholders both from offerors and from management).

633 F.2d at 496.

It is clear from the legislative history of the Williams Act as interpreted by three different Courts of Appeals that a purpose of the Williams Act was to preserve neutrality. It is equally clear that the Illinois Act attempts to alter that neutrality by giving target management a highly potent weapon—delay. In fact, appellant does not even argue that the Illinois Act does not serve to benefit target management. Rather, appellant argues that because the Illinois Act benefits target shareholders it should not be struck down "merely because the balance between the offeror and incumbent management may be affected or a particular offeror might not prevail." Appellant's Br. at 17.

Despite the Illinois Act's stated purpose of neutrality and shareholder protection, its actual provisions have the effect of inhibiting tender offers for the benefit of incumbent management. In *Jones* v. *Rath Packing Co.*, 430 U.S. at 526, the Court stated that the inquiry under the Supremacy Clause "requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." In *Jones*, a federal regulation permitted reasonable variations in the stated weight of certain packaged foods. A California statute required strict accuracy for net-weight labeling. The purpose of both federal and state laws was to protect consumers. However, the Court struck down the California law, even though state and federal law could both be complied with, because the state law interfered with a purpose of the federal law in facilitating value comparisons among similar products. *Id.* at 519. Here, the Illinois Act must yield to the Williams Act,

even though the stated purpose of both is to protect investors, because the state law interferes with the mechanism provided by Congress of protecting investors through the "market approach."

The Fifth Circuit Court of Appeals accepted this analysis in holding the Idaho Take-Over Act unconstitutional:

> Idaho chose to protect investors differently from the way Congress protected investors. . . . Idaho's "fiduciary approach" to investor protection may be one way to protect shareholders, but it is an approach Congress rejected.
>
> Idaho's statute is preempted, because the market approach to investor protection adopted by Congress and the fiduciary approach adopted by Idaho are incompatible.[40]

The actions of Chicago Rivet's management vividly illustrate how state takeover statutes may be exploited to delay or defeat a tender offer. In the absence of the state takeover statutes, MITE could have commenced its offer for Chicago Rivet upon filing its Schedule 14D-1 on January 19, 1979. MITE was delayed while it sought a declaration that the Illinois Act was unconstitutional. Chicago Rivet, taking refuge behind the Pennsylvania Act on the asserted ground that its principal place of business was in Pennsylvania, opposed this action by stating that it had no present intention of invoking the Illinois Act. The Secretary of State, consistent with Chicago Rivet's position, stated that he had not decided whether to enforce the Illinois Act (JA-G-4). MITE was further delayed while Chicago Rivet attempted to invoke the Pennsylvania Act in the Pennsylvania state court and before the Pennsylvania Securities Commission. MITE was delayed by Chicago Rivet's and Dixon's subsequent attempts to enforce the Illinois Act against MITE. Only after all

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[40] *Great Western United Corp.* v. *Kidwell*, 577 F.2d at 1279 (footnote omitted). On the further appeal to this Court three Justices observed that "the very enactment and existence of the Williams Act preempts and invalidates all conflicting state efforts to regulate cash tender offers." *Leroy* v. *Great Western United Corp.*, 443 U.S. at 190.

of these delays, on February 5, 1979, MITE was able to publish its offer in the national edition of the *Wall Street Journal*.

Seventeen days elapsed between the day MITE should have been able to commence its tender offer pursuant to the Williams Act and the day MITE actually commenced its offer. These delays occurred despite the fact that MITE was ultimately not required to comply with either state's statute. Appellant's suggestion that state takeover statutes do not serve the interests of incumbent management is belied by both logic and experience.

The delay which is a necessary result of the Illinois Act's prenotification and hearing provisions does not serve the Williams Act purpose of protecting shareholders as alleged by the state. As the Third Circuit stated:

> During the period of delay, the management may also resort to defensive maneuvers designed to deprive the shareholders of their free choice. Common defensive tactics include arranging a "friendly" merger, increasing dividends, or abolishing cumulative voting. While being subjected to these actions, which are designed to influence their decision, the shareholders cannot enjoy their federally protected right to be informed, or their right to make a choice about the governance of their corporation and the disposition of their shares.

Kennecott Corp. v. *Smith*, 637 F.2d at 189 (footnote omitted). The target's shareholders may additionally suffer by delay because they do not receive interest on the money they would otherwise receive in the offer and could invest during the period of delay. The existence of the Illinois Act and similar state takeover legislation also may serve to discourage tender offers because of the added burdens to be overcome by the bidder, thus harming investors who lose the opportunity to receive tender offer premiums.[41]

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[41] It has been suggested that defensive maneuvers by target management, although they may benefit some investors by creating an auction atmosphere and a higher price, will ultimately harm investors because, as tender offers

footnote continued

It is clear that the Illinois Act must yield to the Williams Act under the Supremacy Clause.[42] A state scheme which so blatantly conflicts with federal purposes cannot survive constitutional scrutiny.

CONCLUSION

If the appeal is not dismissed as moot, the judgment below should be affirmed for the reasons stated herein.

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become more risky and expensive to complete, fewer offers will be made and the aggregate shareholder population will suffer. *See* Easterbrook & Fischel, *The Proper Role of Target's Management In Responding To A Tender Offer*, 94 Harv. L. Rev. 1161, 1174-82 (1981). Moreover, the increased time in which it takes to complete the offer will increase the borrowing costs for the offeror, and thus may reduce the price it will be willing to pay the target shareholders.

[42] The State of New York, as *amicus curiae*, argues that the Illinois Act is not preempted because the Williams Act does not nullify the applicability to tender offers of such other statutes as the Federal Communications Act, 47 U.S.C. § 310 (1976) or the Bank Holding Company Act, 12 U.S.C. §1842 (1976 & Supp. II 1979). New York *amicus* Br. at 9. This argument overlooks the decisive difference that the Supremacy Clause invalidates state law which frustrates congressional enactments but, of course, does not apply to other federal legislation enacted by Congress itself.

APPENDIX A

February 12, 1979

Chicago Rivet & Machine Co.
950 South 25th Avenue
Bellwood, Illinois 60104

Attention: Ralph W. Jindrich,
Chairman of the Board of Directors
President and Chief Executive Officer

Gentlemen:

On February 5, 1979, Mite Corporation through its subsidiary Mite Holdings, Inc. (collectively "Mite") made an offer to purchase any or all stock of Chicago Rivet & Machine Co. ("Rivet") at $28.00 net per share. On February 9, 1979 that offer was amended by raising the price from $28.00 to $30.50 net per share. On February 5, Rivet made an offer to purchase 350,000 shares of its stock at $30.00 net per share. Subsequently, there have been discussions between representatives of Mite and representatives of Rivet during which representatives of Rivet have stated that $30.50 per share was, in the opinion of Rivet's Board of Directors, an inadequate price.

1. Each of Mite and Rivet hereby agrees to withdraw its respective pending tender offer for Rivet stock at or before 10:00 a.m. Eastern Standard Time, February 12, 1979 and not to thereafter purchase any stock of Rivet pursuant to such tender

offer or, in the case of Mite, in any other manner except as hereinafter provided, in consideration of Mite making the following offer:

> Subject solely to the conditions stated in its February 5 offer, amended as shown in Exhibit A attached hereto, on or before March 12, 1979 Mite shall make a cash tender offer for any and all of the stock of Rivet at $31.00 net per share (the "New Mite Offer"), which Offer shall remain open for shareholder acceptance for a period of not less than ten days.

Mite and Rivet further agree as follows:

2. The parties hereto shall negotiate an agreement to merge or otherwise combine Rivet with Mite Corporation or an affiliate of Mite Corporation as soon as practicable after completion of the New Mite Offer, which agreement shall provide, *inter alia*, for a net cash payment to any non-tendering Rivet shareholders of $31.00 per share.

3. Promptly following execution of this Agreement and until March 5, 1979, Rivet shall permit Mite and its officers, employees, agents and representatives access on reasonable notice and during customary business hours to all of Rivet's books, records, properties, plants and facilities and, in this connection, shall request its auditors and attorneys to cooperate with any of Mite's reasonable requests for information (specifically excluding any request for information which is subject to the attorney-client privilege or which constitutes attorney work product). Mite shall keep confidential any and all information received by it or its officers, directors, employees, agents or representatives pursuant to this Paragraph 3, and shall use such information solely for the purposes of evaluating Rivet for the purposes of the transactions contemplated by Paragraphs 1 and 2.

4. The Board of Directors of Rivet will approve the New Mite Offer and recommend its acceptance by all shareholders of Rivet and neither the Board of Directors or officers of Rivet will take

any actions of any kind whatsoever intended to have the effect of preventing or delaying the New Mite Offer.

5. If Mite fails for any reason (other than the pendency of any hearings or investigations by or before any governmental entity) to commence the New Mite Offer on or before March 12, 1979 or to complete the New Mite Offer, Mite hereby agrees that neither it nor any affiliate, as that term is defined in the Rules and Regulations of the Securities and Exchange Commission, will at any time acquire or make any offer to acquire any stock or assets of Rivet or make any offer to merge, consolidate with or otherwise acquire Rivet.

6. On or before February 16, 1979 Mite shall cause (or in the case of Count III of the action pending in the United States District Court for the Northern District of Illinois captioned *Mite Corporation, et al.* v. *Alan J. Dixon, et al.*, No. 79 C 200, use its best efforts to cause) Rivet and the officers and directors of Rivet to be dismissed as defendants with prejudice and without costs in all litigation filed by Mite and currently pending against them and shall deliver to Rivet and its officers and directors general releases of all claims against them arising out of any activities by them occurring on or before the date of execution thereof by a duly authorized officer of Mite. Rivet shall simultaneously therewith cause Mite and/or Wertheim & Co., Inc. and/or Wertheim & Co. and/or their respective officers and directors to be dismissed as defendants with prejudice and without costs in all litigation filed by Rivet and currently pending against them and deliver to all such parties general releases of all claims against them arising out of activities by them occurring on or before the date of execution thereof by a duly authorized officer of Rivet.

7. Until March 12, 1979 (or such earlier date as Mite shall communicate to Rivet a decision in accordance with this letter not to make the New Mite Offer), neither Rivet nor its Board of Directors, officers, employees, agents or representatives (including but not limited to Drexel Burnham Lambert Incorporated) shall solicit or propose or enter negotiations looking toward a

tender offer, merger or other acquisition proposal involving Rivet and any person other than Mite or a subsidiary of Mite.

MITE Corporation.

By [Signed]

R. J. Blinken, Chairman
of the Board of Directors

MITE Holdings, Inc.

By [Signed]

R. J. Blinken, Chairman
of the Board of Directors

Chicago Rivet & Machine Co.

By [Signed]

R. W. Jindrich, Chairman
of the Board of Directors
and President

EXHIBIT A

Conditions

Reference should be made to the Offer to Purchase dated February 3, 1979 for definition of terms used in this Exhibit A not otherwise defined in the Letter Agreement dated February 11, 1979 to which this Exhibit A is attached.

(a) There shall be threatened, instituted or pending any action or proceeding before any court or governmental agency, domestic or foreign, by any government or governmental authority or by any other person, domestic or foreign, challenging the making of the Offer or the acquisition of any Shares by Mite pursuant to the New Mite Offer or otherwise directly or indirectly relating to the New Mite Offer;

(b) There shall have been any action taken or there shall have been any statute, rule regulation or order proposed, promulgated, enacted, enforced or deemed applicable to the New Mite Offer by any government or governmental authority or court, domestic or foreign (including, without limitation, the governmental authorities administering any state tender offer act), that, in the reasonable judgment of Mite, might (i) result in a delay in the ability of Mite to purchase or pay for some or all of the Shares, (ii) render Mite unable to purchase or pay for some or all of the Shares, (iii) make such purchase or payment illegal or (iv) otherwise adversely affect Mite or Rivet or any of their respective subsidiaries or affiliates;

(c) Any change shall have occurred since January 18, 1979 or shall after the date hereof be threatened in the business, assets, liabilities, financial conditions, operations or results of operations of Rivet and its subsidiaries taken as a whole which, in the reasonable judgment of Mite is or may be materially adverse to Rivet and its subsidiaries taken as whole or the value of the Shares, or Mite shall have become aware of any facts or

conditions which, in the reasonable judgment of Mite, have or may have material adverse significance with respect to Rivet and its subsidiaries taken as a whole or the value of the Shares; *provided, however*, that expenses, not exceeding $800,000, incurred on or prior to February 22, 1979 by Rivet in connection with the New Mite Offer, and the prior tender offers for Shares by Mite and Rivet, respectively, shall not be deemed a materially adverse change or to have materially adverse significance to Rivet and its subsidiaries taken as a whole or to the value of the Shares;

(d) There shall have occurred (i) any general suspension of, or limitation on prices for, or trading in, securities on the American Stock Exchange, (ii) a declaration of a banking moratorium or any suspension of payments in respect of banks in the United States or the State of New York or any limitation on the extension of credit by lending institutions in the United States or the State of New York (iii) a commencement of a war, armed hostilities or other international or national calamity directly or indirectly involving the United States or, in the case of any of the foregoing existing at the date hereof, a material acceleration or worsening thereof;

(e) (i) Rivet shall have issued, authorized or proposed the issuance of, additional shares of capital stock of any class or securities convertible into any such shares or rights, warrants or options to acquire any such shares or convertible securities, (ii) Rivet shall have issued, authorized or proposed the issuance of any other securities in respect of, in lieu of, or in substitution for Shares outstanding on January 18, 1979, (iii) Rivet shall have declared or paid any dividend or distribution on any shares of its capital stock other than the regular quarterly dividend at a rate not exceeding $.40 per Share or (iv) Rivet shall have authorized or proposed or announced its intention to propose any business combination with any person (as defined in the Exchange Act) other than Mite, or acquisition of assets, disposition of

assets or material change in its capitalization, or any comparable event, not in the ordinary course of business (other than as contemplated by the New Mite Offer); or

(f) Any person (as defined in the Exchange Act) shall have made or publicly proposed to make, a tender or exchange offer at a price greater than $31.00 per share for some or all of the Shares or shall have publicly disclosed its acquisition of, or shall become known by Mite to have acquired, more than 5% of the outstanding Shares.

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No. 80-1183

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES EDGAR,
APPELLANT,

v.

MITE CORPORATION AND MITE HOLDINGS, INC.,
APPELLEES.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR APPELLANT

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No. 80-1188

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES EDGAR,
APPELLANT,

v.

MITE CORPORATION AND MITE HOLDINGS, INC.,
APPELLEES.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR APPELLANT

ARGUMENT

I.

THE INSTANT APPEAL IS NOT MOOT BECAUSE IF THIS COURT REVERSES THE JUDGMENT BELOW AND THE PERMANENT INJUNCTION ENTERED AGAINST THE ILLINOIS SECRETARY OF STATE, THE APPELLANT CAN THEN BRING AN ACTION,

PURSUANT TO THE ILLINOIS BUSINESS TAKE-OVER ACT, AGAINST MITE CORPORATION FOR PENALTIES.

If the Illinois Secretary of State initiated an action against Mite Corporation (hereinafter "Mite") for penalties, pursuant to the Illinois Business Take-Over Act, he would be in contempt of the permanent injunction entered by the district court. As the Secretary of State is currently enjoined from proceeding against Mite, it is clear that the Seventh Circuit Court of Appeals properly held that the instant case is not moot. *Mite Corp. v. Dixon*, 633 F.2d 486, 490 (1980). If the judgment below is reversed the Secretary can bring an action against Mite for civil and criminal penalties, and the issue of whether the Secretary of State or Mite would prevail ultimately in any such action is not before this Court. Mite is in effect asking this Court to render an advisory opinion upon an issue, not contained in the case at bar, of whether it might prevail in an action brought by the Secretary of State for penalties stemming from its making a tender offer without first getting it registered under the Illinois Act. In the event the judgment below is reversed and the Secretary initiates an action for penalties, Mite can then properly raise any defenses. It is indisputable that if this Court reverses the decision below, the Secretary can bring an action against Mite, while the Secretary is presently enjoined from bringing such an action.

This Court has said that there are two aspects to mootness: 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' *United States Parole Com'n. v. Geraghty*, 445 U.S. 388, 396 (1980). The controversy over the validity of the Illinois Business Take-Over Act is still a "live" one between the Secretary and Mite Corporation. The decision of this Court on the validity of the

Illinois Act clearly will affect the rights of the parties. If this Court affirms the decision below the Secretary cannot bring an action against Mite for violating the Illinois Act. If this Court reverses the decision below, however, Mite will have to defend itself in an action brought by the Secretary pursuant to the Illinois Act. In *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) Great Western completed its tender offer after obtaining injunctive relief, but this Court said:

> . . . That acquisition did not moot the case, however, because the question whether Great Western has violated Idaho's statute will remain open unless and until the District Court's judgment is finally affirmed. *Id.* at 178.

Thus, the instant controversy remains a "live" one and the parties have a legally cognizable interest in the outcome.

Comparing the situation in the case at bar to that in *Tyco Laboratories Inc. v. Connelly*, 473 F.Supp. 1157 (D. Mass. 1979) also illustrates that the instant case is not moot. In *Tyco* the court said that the controversy had ended as Tyco no longer wished to make a tender offer, and, having not made a tender offer, Tyco was not subject to any sanctions under the Massachusett Takeover Act. *Id.* at 1159-60. The court said that Tyco "faces no adverse effects from continued enforcement of the Act" which is clearly not the situation in the case at bar in which the Secretary can bring an action against Mite for sanctions if he prevails on the merits. *Id.* at 1160. In the instant case it is Mite who is now asking for an advisory opinion that it will have a defense to an action brought by the Secretary of State. Mite made no such argument before the Court of Appeals, which correctly held that the possibility of the Secretary bringing an action for sanctions prevents the case from being moot merely because Mite withdrew its tender offer.

Assuming *arguendo* that this Court considers Mite's argument, that it has a defense on the merits to any action brought the Secretary, the instant appeal is still not moot. It is not necessary to even consider whether criminal penalties could be imposed against Mite, as the Illinois Act also provides the Secretary with the right to seek civil penalties. Ill.Rev.Stat., 1979, ch. 121 1/2, §137.65. That Mite could face civil liability precludes any consideration at this point of whether criminal penalties also could be imposed. For this reason the case cited by Mite in its brief, which all deal with criminal sanctions, are inapposite to the case at bar.

Mite argues that if it can be penalized, notwithstanding the injunction it obtained, then it is no better off than if it had not obtained the injunction. On the contrary the injunctive relief obtained by Mite allowed it to make its tender offer without getting it registered under the Illinois Act. Had Mite not withdrawn its tender offer, in the event this Court reverses the decision below the Illinois Act empowers the Secretary to seek a court order rescinding sales that are unlawful under the Act. Ill.Rev.Stat. 1979, ch. 121 1/2, §137.62.A. (A.59a)[1] In that situation Mite could not claim that simply because it completed its tender offer, after obtaining injunctive relief, it is immune from any adverse consequences from not complying with the Illinois Act. Mite is not immune from civil liability for violating the Illinois Act merely because it obtained the injunction from the district court. The decision of the Court of Appeals is itself precedent for the fact that Mite faces potential civil liability. *Mite Corp. v. Dixon, supra*, at 633 F. 2d 490.

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[1] Citation to "A" refers to the Appendix filed with the Jurisdictional Statement. Citation to "JA" refers to the Joint Appendix filed with the appellant's brief.

Although Mite did not argue before the Seventh Circuit Court of Appeals that the case at bar is moot, the Court of Appeals quite properly determined that the case is not moot. Clearly, Mite's assertion that the case is moot is based on an issue, not before the Court of whether the Secretary or Mite would ultimately prevail in an action for sanctions. The fact remains that the Secretary is currently enjoined from applying the Illinois Act against Mite. This demonstrates that the instant controversy is a "live" one which this Court should decide.

II.

THE ILLINOIS ACT IS VALID UNDER THE COMMERCE CLAUSE.

Mite argues that the Illinois Act is not evenhanded, but it is clear that the Illinois Act ensures equal treatment of all shareholders of the target company and applies equally to Illinois offerors and foreign offerors. Nor does the Illinois Act differentiate between "hostile" and "friendly" offers. Mite suggests that the Illinois Act would apply even if no shareholders live in Illinois, but in that event the Secretary is empowered to exempt an offer from registration as not necessary for the protection of Illinois shareholders. Appellees' Br. at 14; Ill.Rev.Stat. 1979, ch. 121 1/2, §137.52-9(5). Mite also points out that the Illinois Act does not apply when an issuer offers to purchase its own securities, but a target company confronted with a tender offer must file any solicitation material, requesting the acceptance or rejection of a tender offer, with the Secretary of State. Ill.Rev.Stat. 1979, ch. 121 1/2, §§137.52-9(4), 137.55. The Illinois Act is clearly evenhanded and does not have the effect of benefitting incumbent management.

Although the Illinois Act has an incidental extraterritorial effect, that is a necessary consequence of protecting Illinois

shareholders. To ensure that Illinois shareholders have full and fair disclosure and adequate time to make an informed decision, the Illinois Act has the incidental effect that all shareholders receive the same benefit. The effect on interstate commerce of requiring an offeror to register its offer with the Secretary, the possibility of a hearing, and the larger time an offer must remain open is slight.

Mite points out that its tender offer "represented a transaction in interstate commerce of approximately $23 million", but it is wrong to look at the effect on interstate commerce of not complying with the Illinois Act. Mite also argues that interstate commerce would be burdened if more than one State asserted jurisdiction, but the Illinois Act contains a comity provision allowing the Secretary to defer to another jurisdiction that is applying a statute that affords substantially equal protection. Ill.Rev.Stat. 1979, ch. 121 1/2, §137.53. The fact that a tender offer will proceed at a slower pace under the Illinois Act does not constitute the type of obstacle that would deter a company from making a tender offer. Although the Secretary has the power to deny registration if he finds that a tender offer "fails to provide full and fair disclosure . . . or that the takeover offer is inequitable or would work or tend to work a fraud or deceit upon the offerees," this is entirely compatible with the Williams Act and does not impose an excessive burden on interstate commerce.[2] Ill.Rev.Stat. 1979, ch. 121 1/2, §137.57.E.

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[2] Appellees assert that appellant argued in the Court of Appeals that it had the power to ascertain the substantive fairness of an offer. The brief for defendant Alan J. Dixon filed in the Court of Appeals stated at page 17:

The district court also concluded that as the Illinois Act authorized the Secretary of State to deny registration to an offer that he finds to be inequitable, this varies from the market approach in the Williams Act.

continued on next page

Illinois clearly has a legitimate local interest in protecting resident shareholders confronted with a tender offer. Protecting investors residing in a state has long been recognized to be a legitimate state objective. *Hall v. Geiger Jones Co.*, 242 U.S. 539, 551 (1917). Chicago Rivet is an Illinois corporation with its principal executive offices in Illinois. Over 43% of Chicago Rivet's common stock is held by the 27% of its shareholders who are residents of Illinois. The State of Illinois' legitimate local interest in protecting its residents who are confronted with a tender offer outweigh the incidental extraterritorial effect on interstate commerce, as compliance with the Illinois Act is not a significant burden. Mite points out that section 28(a) of the Exchange Act was designed to save state Blue Sky laws, but it has been suggested that the legislative history of the 1934 Act does not indicate that the savings clause was intended to be only retrospective, and that Congress did contemplete concurrent regulation of all aspects of securities.[3]

In addition to Illinois' interest in protecting its residents who are confronted with a tender offer, there is a second legitimate local interest in regulating the transfer of control of Illinois or Illinois based corporations with substantial contacts in the State. As argued in appellant's initial brief, a tender offer is sufficiently analogous to traditional internal affairs transactions of a corporation which are the subject of state

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(S.H.A. ch. 121 1/2, §137.57(E)). *The duty of the Secretary to review an offer to see if it fails to provide full disclosure of material information or is inequitable or would work a fraud or deceit, should not be construed as meaning that the Secretary would judge the substantive fairness of e.g., the amount of the offer.* The pre-offer filing and hearing provisions of the Illinois Act are not inconsistent with a market approach by allowing for review by a neutral state administrator, while the security-holders have time to consider the offer. (Emphasis added).

[3] Note, *Preemption and the Constitutionality of State Tender Offer Legislation*, 54 Notre Dame Law. 725, 731-32 (1979).

regulation. Appellant's Br. at 25-27. Here, the target company is an Illinois corporation, with its principal executive offices in Illinois, and substantial number of its shareholders, holding close to half of the shares, are Illinois residents. A tender offer brings a transfer of corporate control, and it is clear that states have an interest in regulating the transfer of corporate control as a corporation is a creature of the State. *Santa Fe Industries v. Green*, 430 U.S. 462, 479 (1977); *Cort v. Ash*, 422 U.S. 66, 84 (1975); *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929, 939 (S.D. Ohio 1979). Accordingly, Illinois has a legitimate interest in regulating this tender offer.

The slight burden placed upon interstate commerce by requiring an offeror to get its tender offer registered and allowing more time for an investor confronted with a tender offer to make a reasoned decision based on full and fair disclosure is not "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The information required under the Illinois Act is substantially similar to that required under the Williams Act, and the Secretary is authorized to accept the registration statement filed with the federal agency. Ill.Rev.Stat. 1979, ch. 121 1/2, §§137.54(C), 137.54(D). Review of an offer by the Secretary of State and the greater time afforded an investor confronted with a tender offer pose only a minimal burden on making a tender offer. The protection and benefits afforded Illinois shareholders, as well as all other shareholders, by the Illinois Act clearly outweigh the minimal incidental burden on interstate commerce.

III.

THE ILLINOIS ACT IS NOT PREEMPTED BY THE WILLIAMS ACT.

MITE asserts that the Illinois Act adopts a "regulatory approach" that is inconsistent with the "market approach" of

the Williams Act (Appellees' Br. at 25-29), but supplemental regulation protecting the investor confronted with a tender offer does not stand as an obstacle to achieving the congressional purpose of protecting investors. This Court has said that the sole purpose of the Williams Act was to protect investors confronted with a tender offer. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 35 (1977). Although Congress sought a policy of evenhandedness, this does not go to the purpose of the Williams Act. *Id.* at 29. The congressional expressions of neutrality do not transform the Williams Act into a comprehensive policy regarding all aspects of a tender offer. If the purpose of the Illinois Act was to protect the target company management or if it would have the effect of precluding the making of tender offers, the Act would stand as an obstacle to achieving the purpose of the Williams Act. The Illinois Act, however, regulates the activities of both the target company and the offeror, while furthering the purpose of the Williams Act by providing supplemental protection for the investor confronted with a tender offer.

MITE argues that the twenty business day pre-commencement filing requirement and possible administrative hearing under the Illinois Act, obstruct Congress' policy of neutrality and aid the target company management. Appellees' Br. at 32-33. As already noted the Illinois Act evenhandedly regulates the activities of the target company as well as the offeror. That Congress considered pre-commencement notification provisions without adopting them, does not establish that the Illinois Act is preempted. *DeCanas v. Bica*, 424 U.S. 351, 360 (1976). The pre-commencement filing and the possibility for an expeditious hearing before the Secretary of State do not render the shareholders the prey of incumbent management. The pre-commencement filing and hearing provisions are consistent with a market approach as the investor will still decide whether or not to tender his shares.

The Illinois Act does not have the effect of precluding the making of tender offers. Providing for a pre-commencement filing and possible expeditious hearing will hardly dissuade a company, that has made a business decision to acquire another company via a tender offer, to forego such an opportunity. Whether a particular offeror might be unsuccessful because the greater time afforded the investor by the Illinois Act might result in a competing bid, does not stand as an obstacle to achieving Congress' purpose of protecting the investor. If the target company management is able to arrange a more lucrative offer, it is the shareholder who will decide whether to tender his shares and who will benefit from a more lucrative offer.

The Williams Act affords the investor confronted with a tender offer certain minimum protections, and coordinate state regulation offering investors additional protection do not conflict with the Williams Act unless the state regulation would preclude the making of tender offers. Mite's argument that the Williams Act was designed to achieve a balance between the offeror and the target company is certainly deflated by the fact that the SEC now requires a tender offer to remain open for 20 business days. Securities Exchange Act Rule 14e-1, 17 C.F.R. §240.14e-1(1980). It is clear that the interest of Mite, or of any offeror, is to acquire the shares of the target company as cheaply as possible. The interest of the shareholders confronted with a tender offer is to obtain the highest possible price for their shares. Although speed and surprise are unquestionably beneficial to an offeror, the Williams Act was not enacted to protect an offeror who is making a tender offer. While a tender offer for all the shares of a target company need only remain open seven days under the Williams Act (15 U.S.C. §78n (d)(5)(1976)), the fact that a tender offer will proceed at a slower pace under the Illinois Act does not present a conflict when the investor is the beneficiary of the additional protection. The popularity of the cash tender offer

as the favored mechanism for acquiring another company certainly has not lessened since the SEC increased substantially the time a tender offer must remain open from the seven day minimum period in the Williams Act. This shows that the time periods in the Illinois Act would not deter the making of tender offers, and that the Illinois Act therefore does not conflict with the purpose of Congress in enacting the Williams Act.

Similarly, review by the Secretary of State regarding whether there has been full disclosure, or whether a tender offer would work a fraud, can hardly be deemed to conflict with the Williams Act which requires disclosure and contains broad anti-fraud provisions. The duty of the Secretary of State under the Illinois Act is to protect the shareholder confronted with a tender offer, and despite the Court of Appeal's opinion that a hearing could be of infinite duration there is no basis for presuming that the Secretary would be a pawn of a target company or otherwise not administer his duties expeditiously. Finally, the Secretary has consistently contended that the Illinois Act does not empower him to pass on the substantive fairness of an offer. Appellant's Br. 21-22. The Illinois Act merely ensures that there is full disclosure and adequate time for an investor to make an informed decision. The language in the Illinois Act providing that the Secretary can deny registration if an offer "is inequitable or would work or tend to work a fraud or deceit" should be construed in the conjunctive, as the power to pass on the substantive fairness of the offer is inconsistent with the purpose of the Illinois Act.

Securities regulation is a field in which coordinate state and federal regulation is well established. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973). Protection of investors, which is the sole purpose of the Williams Act, is not dependent upon the exclusivity of the Williams Act. Supplementing the protection afforded an investor, by

ensuring that full disclosure has been made and that the investor has adequate time to make an informed decision, does not conflict with the Williams Act. Congress has not expressly or implicitly preempted concurrent state regulation of tender offers. As the Illinois Act furthers the purpose of the Williams Act, it is clear the Illinois Act is valid under the Supremacy Clause.

CONCLUSION

For the above mentioned reasons, the Appellant, James Edgar, respectfully prays that this Honorable Court reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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No. 80-1168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES EDGAR,

Appellant,

against

MITE CORPORATION and MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

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No. 80-1188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES EDGAR,

Appellant,

against

MITE CORPORATION and MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

Interest of *Amicus Curiae*

The State of New York has a significant interest in the issues presented by this appeal since the decision of this Court may affect the validity of the New York Security Takeover Disclosure Act, New York Business Corporation Law ("N.Y.B.C.L.") Article 16, § 1600, *et seq.* (McKinney's) (the "New York Act").

The New York Act is similar in purpose to the Illinois statute that is challenged in the case at bar, Illinois Business Takeover Act, Ill. Ann. Stat. ch. 121 ½, §§ 137.51 *et seq.* (Smith-Hurd Cum. Supp. 1980) (the "Illinois Act"),

in that both Acts serve to provide investors with full and fair disclosure in connection with a tender offer. There are, however, substantial differences in the two Acts. For example, the Illinois Act contains several provisions that are not embodied in the New York Act, including a twenty business day pre-offer filing requirement, Ill. Ann. Stat. ch. 121 1/2, § 137.54(E) (Smith-Hurd); a requirement that the offer remain open for twenty days, Ill. Ann. Stat. ch. 121 1/2, § 137.59(B) (Smith-Hurd); and a provision allowing the State to deny the registration of the takeover offer or condition its registration if the State determines the takeover offer is, *inter alia*, inequitable, Ill. Ann. Stat., ch. 121 1/2, § 137.54(E) (Smith-Hurd).

Congress first entered the field of tender offers in 1968 when it amended the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* by enacting the Williams Act, Pub. L. No. 90-439, 82 Stat. 454, codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f). In 1979, pursuant to its rule-making authority under the Securities Exchange Act and the Williams Act, the Securities and Exchange Commission (the "S.E.C.") promulgated rules that apply to certain tender offers. Securities Exchange Act Release No. 16384, 44 Fed Reg. 70,326 (1979). Among those rules recently promulgated is Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b), which provides that a public announcement of a tender offer constitutes the commencement of a tender offer and that the offeror must, within five days of such public announcement, either withdraw the offer or disseminate certain information to security holders, which date of dissemination is then deemed the date of commencement.*

One Rule 14d-2(b) became effective in 1980 the time frames contained in the state statutes no longer corresponded to those in the federal statute. In 1980 New

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* Since this rule was promulgated subsequent to the tender offer in the instant case, the rule is not applicable to the facts herein.

York amended its takeover statute, *inter alia*, to conform to the new S.E.C. rules. Among those revisions to the New oYrk Act was the deletion of the pre-commencement filing period, L. 1980, ch. 733, § 2,* with the result that the New York Act was the deleiton of the pre-commencement in concert.

The State of New York has an interest in protecting the validity of its statute. The State of New York strongly believes in the need for state takeover statutes and is satisfied that the New York Act is valid under the Commerce and Supremacy Clauses of the United States Constitution.

The State of New York also supports the constitutionality of the Illinois Act.

Summary of Argument

The Ilinois Act does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Williams Act, hence is not preempted. Even assuming that the Illinois Act regulates questions of substantive fairness in tender offers, such regulation is consistent with Congressional enactments. Any incidental delay which may result from the Illinois Act enures to the benefit of investors and is therefore consistent with Congressional objectives with respect to the Williams Act.

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* The 1980 amendments also deleted the "friendly offer" exemption, L. 1980, ch. 733, § 1 and the Attorney General's authority to halt the continuation of a tender offer or its commencement, L. 1980, ch. 733, § 2. The amendments further added N.Y.B.C. L. § 1614, L. 1980, ch. 733, § 3, commonly referred to as the "comity" provision, which authorizes the Attorney General to defer the filing of the registration statement (and administrative review) to a sister state having a greater interest than New York in regulating the tender offer when the target company is not organized under the laws of New York. Additional limitations placed upon the Attorney General include reductions in the amount of time in which he must complete his review. N.Y.B.C.L. §§ 1604, 1605; L. 1980, ch. 733, § 2.

Congress has specifically permitted state regulation of tender offers.

Two legitimate local public interests are furthered by the Illinois Act since a tender offer involves two kinds of transactions. A tender offer is on the one hand an internal corporate affairs transaction, which is traditionally governed at the state level, and on the other hand, a securities transaction, which is traditionally governed at both the state and federal levels. In effectuating both of these interests in the regulation of tender offers, Illinois is concerned with the protection of Illinois shareholders. The benefits conferred on shareholders by the Illinois Act clearly outweigh any alleged burdens of compliance with the Illinois Act.

The decision of this Court should acknowledge the efforts of states such as New York to harmonize their statutes with the federal law regulating tender offers. If this Court finds any provision of the Illinois Act to be in conflict with the Williams Act, it should limit its decision in order to preserve those portions of the state statutes which are constitutional and which complement the federal regulatory scheme.

ARGUMENT

POINT I

The Illinois Act is not preempted by the Williams Act.

The Court of Appeals based its conclusion that the Illinois Act is preempted by the Williams Act on its interpretation of the Congressional intent underlying the Williams Act:

> We therefore conclude, purely in light of the congressional judgment and analysis, that tender offers may not be unduly hindered (by grossly extended delay under state law) to the detriment of investors. We reiterate that we possess no independent insight,

based on evidence or research, about what the effect of slight or interminable delay may be. But we think the perspectives informing congressional legislation are reasonably clear and are binding upon us. Therefore, we conclude that the Illinois Act is preempted by the Williams Act because the former (1) tends inordinately to substitute regulatory control for investor autonomy, (2) provides for hearings the institution of which may be indirectly delegated to incumbent management and which are potentially interminable in length, (3) provides for other delays and mechanisms for delay which are potentially grossly in excess of the delay mandated by Congress and deemed by Congress to be appropriate to the protection of investors and (4) provides for lengthy prenotification delay, a requirement Congress specifically rejected. 633 F. 2d 498-9.

It is submitted, however, that the Court of Appeals erred in its conclusion because it misinterpreted the intent of Congress in enacting the Williams Act and misconstrued the effect the Illinois Act would have on a tender offer.

The *amicus* agrees with the Court of Appeals that Congress has neither expressly barred the states from regulating tender offers, nor enacted so pervasive a regulation that implicit preemption may be inferred. 633 F. 2d 491. Congress has declared that states may regulate tender offers provided that such regulation is not in conflict with the Williams Act. Securities Exchange Act § 28(a), 15 U.S.C. § 78bb(a).* Where there is no explicit or implicit

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* Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a) provides in pertinent part:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person *insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.* (Emphasis added.)

This Court has held that "section [28(a)] was plainly intended to protect, rather than limit, state authority." *Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 182 (1979).

preemption, the Illinois Act must be upheld absent a showing that it is in conflict with the Williams Act:

> Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is 'to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'
>
> *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-526 (1977).

See, *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963).

The Illinois Act does not conflict with the Williams Act. Nor is it an obstacle to the execution of Congressional objectives.

A. The Provision for State Substantive Review

The Court of Appeals found Ill. Ann. Stat. ch. 121 1/2, § 137.57 (E) (Smith-Hurd) to be "the most troublesome portion of the Illinois Act." 633 F. 2d 493. That Section provides that the Illinois Secretary of State shall deny the registration of a take-over offer, or condition the registration on changes or modification, if he finds that:

> . . . the take-over offer fails to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, or that the take-over offer is inequitable or would work or tend to work a fraud or deceit upon the offerees, or that the take-over offer will not be made to all offerees in this

> State on substantially equal terms, or that the take-over offer would violate this Act. . . .
>
> Ill. Ann. Stat. ch. 121 1/2, § 137.57 (E) (Smith-Hurd).

Despite the State's declaration that this section does not mean it would rule on the substantive fairness of the offer,* the Court of Appeals held that

> the Illinois Act thus empowers the Secretary of State to pass upon the substantive fairness of a tender offer and to prohibit it from going forward, if, in his sole opinion, he judges the offer 'inequitable.'
>
> 633 F. 2d 493.

Assuming, *arguendo*, that the Illinois statute provides for substantive review of the fairness of the tender offer, such review is not preempted by the Williams Act, which is consistent with regulatory statutes.

The legislative history of the Williams Act** shows that it was intended to provide an evenhanded opportunity to the offeror and target company to present their case. As

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* The Brief for Defendant Alan J. Dixon submitted to the Court of Appeals stated, at page 17:

> The district court also concluded that as the Illinois Act authorized the Secretary of State to deny registration to an offer that he finds to be inequitable, this varies from the market approach in the Williams Act. (S.H.A. ch. 121 1/2, § 137.57(E)). *The duty of the Secretary to review an offer to see if it fails to provide full disclosure of material information or is inequitable or would work a fraud or deceit, should not be construed as meaning that the Secretary would judge the substantive fairness of e.g., the amount of the offer.* The pre-offer filing and hearing provisions of the Illinois Act are not inconsistent with a market approach by allowing for review by a neutral state administrator, while the security-holders have time to consider the offer. (Emphasis added).

** See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) for a discussion of the legislative history of the Williams Act.

stated by the Court of Appeals for the Fifth Circuit:

> The underlying purpose of the Williams Act is to protect investors. *Piper* v. *Chris-Craft Industries, Inc.*, 1977, 430 U.S. 1, 97 S. Ct. 926, 51 L.Ed.2d 124. Congress chose this goal in the Williams Act and adopted a distinct means of achieving it. Essentially, Congress relied upon a 'market approach' to investor protection. The function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself.
>
> *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256 at 1276 (5th Cir. 1978) *reversed on venue grounds sub nom. Leroy* v. *Great Western United Corp.*, 433 U.S. 173 (1979).

However, nothing in the Williams Act, or its "market approach," *supra*, nullifies requirements for regulatory approval in connection with tender offers. The market approach merely allows all sides to a tender offer to present their views to the shareholders, who can then decide for themselves. When regulatory approval is required in a tender offer, such requirement is one of the factors to be disclosed to investors.

In adopting new rules pursuant to the Williams Act, the S.E.C. recognized that regulatory approval may be required in connection with tender offers. 44 Fed. Reg. 70,330 (1979). The S.E.C. specifically referred to regulation in the banking and communications fields. *Id.* at fn. 17. Certainly banking regulations which inquire into the convenience and needs of the community to be served, 12 U.S.C. § 1842(c), or broadcast license regulations considering the public interest, convenience and necessity, 47 U.S.C. § 310(d), could not coincide with the Williams Act if the Court of Appeals' analysis of the market approach were correct.

The Court of Appeals, in holding the Illinois Act preempted, stated:

> The state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress. Congress contemplated only that investors be protected from acting in ignorance, not from their own well-informed choice. Thus, to the extent that Illinois has chosen to rely upon its Secretary of State's judgment rather than upon investors' own judgment after full disclosure of the relevant facts, its regulatory scheme stands in fundamental conflict with federal law and is therefore unconstitutional. *Cf. Kidwell, supra* at 1279.
>
> 633 F.2d 494.

As indicated above, this analysis is faulty since it fails to consider that when regulatory approval is required in a tender offer context, the regulator's judgment will have an impact on the tender offer. Congress, with the enactment of the Williams Act, did not nullify the Federal Communications Act, 47 U.S.C. § 310, or the Bank Holding Company Act, 12 U.S.C. § 1842, which Acts scrutinize the substantive merits of the transfer of control in a tender offer. Neither did Congress preempt the Illinois Act which contains provisions for regulatory review.

B. The Potenital for Delay

The Court of Appeals criticized the Illinois hearing provisions because they could be triggered by private parties and because they can provide a delay which would stand as an obstacle to the objectives of the Williams Act, which the court stated requires a neutral balance.* 633 F.2d at

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*The Illinois Act, which must be interpreted in a manner that does not favor either the offeror or the target company man-

(footnote continued on following page)

495. According to the Court of Appeals, if the balance is tipped in favor of incumbent management, tender offers will be impaired, thereby denying shareholders the right to tender their shares at a premium. 633 F.2d 496.

The Court concluded that inasmuch as the Illinois Act provides the potential for excessive delay, that Act must fall because Congress did not intend lengthy delays in tender offers. *Id.* at 499.

However, the record is devoid of any actual effect the Illinois Act may have on tender offers, *Id.* at 497. Moreover, there is substantial evidence that the various state takeover statutes have not precluded a market approach to tender offers, have not deterred offerors from making tender offers and have not prevented target companies from being acquired. *Sharon Steel Corp.* v. *Whaland*, —— N.H. ——, No. 80-333 at 14 (Sup. Ct. N.H. July 2, 1981).

Although the Court of Appeals was aware that extending the offering period in tender offers has the effect of creating an "auction market," thereby yielding larger

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(footnote continued from preceding page)

agement, is neutral. Ill. Ann. Stat. ch. 121 1/2 § 137.51-1 (Smith-Hurd) (Findings and Purpose) states:

> In recent years numerous companies have been subjected to take over offers in which equity securities were acquired suddenly by means of tender offers. Many of these tender offers have been made without advance notice and without giving securityholders of the acquired company adequate time to consider the offer and without giving management of the acquired company adequate time to evaluate alternatives so that they might recommend a course of action that would be in the best interests of all securityholders. The purpose of this Act shall be to protect the interests of Illinois securityholders of companies having a close connection with this State without unduly impeding take-over offers *and this Act shall be interpreted so as to strike a balance that does not favor either management of a target company or an offeror.* (Emphasis added)

See, *Piper* v. *Chris-Craft Industries, Inc., supra,* 430 U.S. at 29-30 (1977).

premiums to investors, the court, in the absence of any data to the contrary, held that delay harms investors and thereby frustrates the Williams Act. 633 F.2d 497-8. *But see,* Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western,* 53 N.Y.U. L. Rev. 872 (1978) (hereinafter, *"A Response to Great Western"*) (the state takeover statutes enhance, rather than disturb, neutrality).

If the Court of Appeals is correct that the intent of Congress was to provide shareholders with a premium over the market price, 633 F.2d 497, clearly state statutes which have had the incidental effect of raising even those premiums must, following the Court of Appeals' reasoning, be found to parallel Congressional intent with respect to the Williams Act. Indeed, studies demonstrate that during the period between 1974 and 1980, taking all competitive hostile takeover bids into consideration, shareholders reaped $1.7 billion more for their shares in premiums over the original tender offer price (rather than the lower market price), which premiums are attributable to extended time periods under state takeover laws. *E.g., Is the Takeover Game About to End?,* 150 Financial World 59-60 (March 15, 1981); Chatlos, *The SEC vs. Investors on Tender Offers,* 56 Harv. Bus. Rev. 6-8 (Sept.-Oct. 1978).

The Court of Appeals was aware that the S.E.C., by promulgating, in 1979, 17 C.F.R. § 240.14e-1, extended the minimum offering period in tender offers to 20 business days. 633 F.2d 499 fn 25. Nevertheless, in finding that the Illinois Act delays offers in excess of the minimum period in the Williams Act, the Court of Appeals referred to legislative history indicating a ten day Williams Act waiting period. 633 F.2d 498.

Although a pre-offer period was considered by Congress and rejected, 633 F.2d 497 fn 23, such rejection does not justify an inference of Congressional intention to preempt state statutes containing such provisions. *DeCanas* v.

Bica, 424 U.S. 351, 360 fn. 8 (1976). S.E.C. rule 17 C.F.R. § 240.14d-2, providing an apparent conflict with the Illinois pre-offer filing, was not promulgated until after the tender offer in the instant case. In any event, such periods serve to benefit investors. *AMCA Int'l Corp.* v. *Krouse*, 482 F. Supp. 929, 940 (S.D. Ohio 1979).

The *amicus* submits that the Court of Appeals erred in finding that delays beyond those enunciated in the Williams Act are contrary to Congressional intent. Congress has determined in the securities area to protect state jurisdiction. *Leroy* v. *Great Western United Corp.*, *supra*, 443 U.S. at 182. It is clear that any delay in state tender offer laws serves to protect investors, the only beneficiaries of the Williams Act. *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. 1. Therefore such delay cannot frustrate the effectuation of Congressional policy to protect investors.

POINT II

The Illinois Act is valid under the Commerce Clause.

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several states . . ." U.S. Const., Art. 1, § 8, cl. 3. It has long been established, however, that "the National Government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation." *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 140 (1973). Indeed, the States ". . . retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Lewis* v. *BT Investment Managers, Inc.*, —— U.S. ——, ——, 100 S. Ct. 2009, 2015, 64 L.Ed.2d 702, 711 (1980); *Raymond Motor Transporation, Inc.* v. *Rice*, 434 U.S. 429, 440 (1978).

Congress has long recognized the role of states in securities regulation and tangible evidence of this is discussed *ante*, at page 5 with reference to preemption. *See, Hall* v. *Geiger-Jones Co.*, 242 U.S. 539, 552 (1917); *Leroy* v. *Great Western United Corp., supra*, 443 U.S. at 182; *Telvest, Inc.* v. *Bradshaw*, 618 F.2d 1029, 1035 (4th Cir. 1980); *Hi-Shear Industries, Inc.* v. *Neiditz*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,805 (D. Conn. 1980).

Regularly enacted state statutes are presumed to be valid, *McDonald* v. *Board of Election Comrs.*, 394 U.S. 802, 809 (1969); *Fleming* v. *Nestor*, 363 U.S. 603, 617 (1960), and absent a clear showing of unconstitutionality, should be construed so as to uphold their constitutionality. *United States* v. *Vuitch*, 401 U.S. 62, 71 (1971). This presumption perforce attaches to statutes alleged to violate the Commerce Clause. *See, Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1976); *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U.S. 177, 190-191 (1938). The Court below relied on mere speculation to strike down the Illinois Act as violative of the Commerce Clause; and since no clear showing of unconstitutionality has been advanced, the Illinois Act should be upheld. *See, Sharon Steel Corp.* v. *Whaland, supra*, No. 80-333 at 14.

The prevailing rule for determining the constitutionality of a state statute affecting interstate commerce was stated by this Court in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

In *Raymond Motor Transportation, Inc.* v. *Rice, supra*, the Court recognized that application of the test must be on a case-by-case basis:

> . . . experience teaches that no single conceptual

> approach identifies all of the factors that may bear on a particular case. Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.
>
> 434 U.S. at 441. (footnote omitted.)

Applying the principles enunciated in *Pike* to the instant case, it is indisputable that the Illinois Act is valid under the Commerce Clause.

A. The Illinois Act Evenhandedly Vindicates Legitimate Local Public Interests

The Illinois Act guarantees equality of treatment for all shareholders of the target company; it makes no distinction between shareholders within and without the State. Ill. Ann. Stat. ch. 121 1/2, § 137.52-4 (Smith-Hurd). The Illinois Act applies to Illinois and foreign offerors alike. Ill. Ann. Stat. ch. 121 1/2, § 137.52-5 (Smith-Hurd). The Act not only regulates the activities of the offeror; it also regulates the activities of the target. Ill. Ann. Stat. ch. 121 1/2 §§ 137.55, 137.58, 137.60(C) (Smith-Hurd). It is patent that the Illinois Act is evenhanded.

Two local interests are furthered by the Illinois Act. First, Illinois has an interest in regulating the internal affairs of corporations incorporated in Illinois and operating under Illinois law,* which is traditionally a proper

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* The Illinois Act applies to an offer to acquire or the acquisition of any equity security of a target company pursuant to a tender offer, Ill. Ann. Stat. ch. 121 1/2, § 137.52-9 (Smith-Hurd), and a target company is defined to mean a corporation (1) of which 10% of the outstanding securities is held of record by Illinois security holders, or (2) that meets any two of the following conditions: (a) has its principal executive office in Illinois; (b) is organized under the laws of Illinois; (c) has at least 10% of its stated capital and paid-in surplus represented in Illinois. Ill. Ann. Stat. ch. 121 1/2, § 137.52-10 (Smith-Hurd).

subject of state regulation. *See, Burks* v. *Lasker*, 441 U.S. 471, 478 (1979); *Cort* v. *Ash*, 422 U.S. 66, 84 (1975). In *Santa Fe Industries* v. *Green*, 430 U.S. 462, 479 (1977) this Court stated:

> Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overriden. As the Court stated in *Cort* v. *Ash, supra:* 'Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.' 422 U.S. at 84. (Emphasis added.)

A tender offer involves a transfer of corporate control; that is, after all, the very reason why the offeror makes the bid. It is manifest that states have a legitimate local interest in regulating the transfer of corporate control since corporations are creatures of the state. *Cort* v. *Ash, supra*, 422 U.S. at 84. States therefore have a decided interest in regulating tender offers. *Sharon Steel Corp.* v. *Whaland, supra*, No. 80-333 at 14-15; *AMCA Int'l Corp.* v. *Krouse, supra*, 482 F. Supp. at 939; *Strode* v. *Esmark*, [1980] Fed. Sec. L. Rep. (CCH) ¶ 97,538, at 97,808. (Ky. Cir. Ct. May 13, 1980).

A tender offer is not merely the sale of stock by one investor to another. If that were so, the transaction could be effected through a national securities exchange or over-the-counter market. Indeed, in enacting the Williams Act, Congress recognized that something more than the sale of stock is involved. *E.g., Senate Comm. on Banking and Currency, Full Disclosure of Corporate Equity Ownership*

and in Corporate Takeover Bids, S. Rep. No. 550, 90th Cong., 1st Sess. 2-4 (1967). A tender offer contemplates obtaining enough voting stock to effectuate whatever purposes the offeror has in taking over the target company. With the takeover inevitably come a new board of directors, new management, dilution in voting power, and a merger into the offeror. Traditionally, these are subjects of state regulation. *See, e.g., Zahn* v. *Transamerican Corp.,* 162 F.2d 36, 45-46 (3rd Cir. 1947).

Thus, unless a shareholder tenders his stock, he necessarily becomes a minority shareholder in a new entity with new management and new control. The tender offer therefore alters the fundamental character of the corporation, much like a proxy contest or a merger. A tender offer is clearly a transaction involving the internal affairs of a corporation, and as such is properly the subject of state regulation. *AMCA Int'l. Corp.* v. *Krouse, supra,* 482 F. Supp. at 939; *see,* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 Case W. Res. L. Rev. 722, 741-45 (1970); *A Response to Great Western, supra,* 53 N.Y.U. L. Rev. at 914-15.

In the case at bar, the target company is incorporated under the laws of Illinois, has its principal executive offices in Illinois, and has a substantial number of Illinois shareholders holding a substantial amount of its shares. Every aspect of the target company's existence, including the transfer of its stock, is governed by the laws of Illinois. All shareholders of the target company hold their stock subject to Illinois law. Illinois, therefore, has a legitimate interest in regulating this tender offer.

The second local public interest furthered by the Illinois Act is the protection of shareholders by requiring that the offeror provide to offerees full and fair disclosure of all material information concerning the takeover. Ill. Ann. Stat. ch. 121 1/2, § 137.57(E) (Smith-Hurd). The

stated purpose of the Illinois Act is to "protect the interests of Illinois securityholders." Ill. Ann. Stat. ch. 121 1/2, § 137.51-1 (Smith-Hurd). It is beyond question that the protection of shareholders is a legitimate state interest, as the Court below recognized. 633 F.2d at 500; *See, AMCA Int'l Corp.* v. *Krouse, supra,* 482 F. Supp. at 939; *Burks* v. *Lasker, supra,* 441 U.S. at 478; *Cort* v. *Ash, supra,* 422 U.S. at 84; *Santa Fe Industries, Inc.* v. *Green, supra,* 430 U.S. at 479.

Thus, the Illinois Act vindicates two legitimate local public interests: regulation of the internal affairs of its corporations, which is traditionally a matter for state regulation, and protection of investors, which has traditionally been shared by both federal and state regulators.

B. The Local Benefits Outweigh Any Incidental Burden on Commerce

The Illinois Act does not impose any burden on commerce that is "clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc., supra,* 397 U.S. at 142. This Court has recently stated, ". . . the Commerce Clause does not invalidate state legislation simply because the legislation burdens interstate commerce." *Kassel* v. *Consolidated Freightways Corp. of Delaware,* —— U.S. ——, ——, 101 St.Ct. ——, ——, 67 L.Ed.2d 580, 599 (1981). Any extraterritorial effects are only incidental; they do not cause interstate disruption.

The Illinois Act imposes relatively minor burdens on interstate commerce. While the Act does empower the state to hold hearings, Ill. Ann. Stat. ch. 121 1/2, § 137.57(A) (Smith-Hurd), and even to deny registration of an offer, Ill. Ann. Stat. ch. 121 1/2, § 137.57(E) (Smith-Hurd), the basis for such action would be protection of offerees—i.e., to determine whether they had received full and fair disclosure. To ensure that all offerees—not just Illinois offerees—receive full and fair disclosure imposes

no excessive burden on interstate commerce. Indeed, this merely parallels and helps to accomplish the exact purpose of the Williams Act, § 14(e), 15 U.S.C. § 77n(e).

The information that is required to be prepared by the Illinois Act is substantially the same as that required to be prepared by the Williams Act. Ill. Ann. Stat. ch. 121 1/2, § 137.54(C) (Smith-Hurd). In fact, Illinois will accept, in lieu of the Illinois registration statement, "a registration statement form or other filing required by a federal or state government agency . . . which . . . encompass[es] disclosure requirements substantially equivalent to those contained in subsection c of this Section." Ill. Ann. Stat. ch. 121 1/2, § 137.54(D) (Smith-Hurd). Also, while the Illinois Act requires registration, such process must be administered "without unduly impeding take-over offers." Ill . Ann. Stat. ch. 121 1/2, § 137.51-1 (Smith-Hurd).

It is important to distinguish between burdens imposed on commerce and burdens imposed on a particular offeror. This Court is concerned only with possible burdens on commerce. The filing of a registration statement by the offeror is not a burden on commerce.

The assumption that the Illinois Act unduly burdens commerce is based entirely on conjecture. The Court below speculates that had Illinois not been enjoined, "over 23 million dollars [the purchase price] of interstate commerce would presumably have been affected." 633 F.2d at 502. The Act does not necessarily prevent the flow of money in commerce. The Act merely mandates the registration of an offer, Ill. Ann. Stat. ch. 121 1/2, § 137.54 (Smith-Hurd), but the offeror in the instant case refused even to file a registration statement. It is not an excessive burden on commerce for the State of Illinois to require a registration statement in order to protect shareholders before the flow of money begins.

All aspects of corporate existence with respect to shareholders, residents and non-residents alike, are governed by the laws of the state of incorporation, yet it cannot seriously be argued that such laws unconstitutionally burden interstate commerce. For example, shareholders of New York corporations look to the New York Business Corporation Law for their rights, be they appraisal rights, voting rights, preemptive rights, or rights with respect to corporate control, be it a merger, a consolidation, a takeover bid, or a major asset sale.

In purchasing shares of a corporation, the purchaser consents to be governed by laws of the state of incorporation. For example, any shareholder of a New York corporation, no matter what his state of residence, is both limited and protected by various provisions of New York law, e.g., N.Y.B.C.L. § 623(k) (appraisal rights), § 624 (access to corporate records), § 626 (right to bring a derivative suit), and § 510 (dividend rights). New York law reaches all shareholders of New York corporations, whether they are resident or non-resident shareholders, to effectuate New York's interest in regulating corporations created by its statutes. *Cort* v. *Ash, supra,* 422 U.S. at 84. In like fashion, shareholders of Illinois corporations are governed by Illinois law.

That state legislation may have an extra-territorial effect does not by itself vitiate such legislation under the *Pike* test. *Minnesota* v. *Clover Leaf Creamery Co.,* —— U.S. ——, ——, 101 S.Ct. ——, ——, 66 L.Ed.2d 659, 674-5 (1981); *Raymond Motor Transportation, Inc.* v. *Rice, supra,* 434 U.S. 44; *Huron Cement Co.* v. *Detroit,* 362 U.S. 440, 443 (1960); *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 770 (1945). In the instant case, the fact that the protection afforded to Illinois shareholders by the Illinois Act will also reach other shareholders is merely an incidental aspect of effective protection for Illinois residents. It is not an interference with interstate com-

merce. *AMCA Int'l Corp.* v. *Krouse, supra,* 482 F. Supp. at 939.

The fear expressed by the Court below that an excessive burden on commerce would result if states in addition to Illinois claim jurisdiction over a particular tender offer, 633 F.2d at 502, is unwarranted. The comity provision in the Illinois Act renders the registration provisions of the Act inapplicable where Illinois shareholders would be adequately protected by application of another state's takeover statute. Ill. Ann. Stat. ch. 121 1/2, § 137.53 (Smith-Hurd).

The Court below also speculates that the "potentially prolonged delay required by the Act may, in some circumstances at least, be detrimental to the interests of the shareholders." 633 F.2d at 502. But it has been found to be of particular benefit to the shareholder to have time to make an informed decision whether or not to tender his shares. In *Strode* v. *Esmark, Inc., supra,* ¶ 97,538 at 97,806, the Court stated:

> Indeed, the principal effect of state takeover statutes appears to be that they afford more time to the target and its shareholders to consider and respond to the offer. This additional time has often resulted in higher bids being offered to the target companies' shareholders either by the initial bidder or by a third party making a competing bid.

Hasty, ill-considered decision making is not a benefit to any shareholder. *Curtiss-Wright Corp.* v. *Kennecott Corp.* [Current] Fed. Sec. L. Rep. ¶ 97,803, at 90,026 (CCH) (S.D.N.Y. December 26, 1980).

The shareholders benefit in another way when the offer is open for a longer time. The dynamics involved in a tender offer are unlike those in any other transaction. The offeror makes its bid when and at a price it wants; and it stands to benefit if the offer moves forward at a gallop,

for the swift pace virtually precludes a competitor, who has not had the benefit of research, from making a competing bid. As such, the original offering price tends to be lower; there is neither competition from another bidder, nor incentive for the offeror to raise its price. Any prolonged offering period can only benefit the offerees.* Studies have shown that the price they are offered for their shares tends to increase the longer the offer is open because it enables competitive bids to enter the market place. *E.g.*, Chatlos, *The SEC vs. Investors on Tender Offers, supra*, 56 Harv. Bus. Rev. at 8; *see also, AMCA Int'l Corp.* v. *Krouse, supra*, 482 F. Supp. at 940.

It is not only the Illinois shareholders who benefit from a bidding contest or from additional disclosures; all shareholders benefit. Certainly that is not an excessive burden on commerce. It is evident that none of the incidental burdens on commerce exceed the benefits conferred by the Illinois Act, and the Commerce Clause is not violated.

POINT III

The governance of corporations within their jurisdiction is a traditional area of State regulation which must be preserved.

The legitimate and traditional interest of the states in the regulation of securities transactions and in the affairs of corporations within their jurisdiction must be preserved. As this Court has recently stated, "[A] State's power to regulate commerce is never greater than in matters traditionally of local concern." *Kassell* v. *Consolidated Freight-*

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* Indeed, nothing in the Williams Act or its market approach gives an offeror ". . . a right under the Williams Act to complete its tender offer successfully." *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1277 (5th Cir. 1978) *rev'd on venue grounds sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979), citing *Piper* v. *Chris-Craft Industries, Inc., supra*, 430 U.S. at 34-35.

ways, supra, —— U.S. at ——, 101 S. Ct. at ——, 67 L. Ed.2d at 586, citing *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. 333, 350 (1977). The change of control and ownership of a corporation which is the intended result of a public tender offer is just such a matter of traditional local concern.

The Illinois Act, just as the statutes of 35 other states* including that of New York, attempts to vindicate that local concern through legislation primarily intended to

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* Alaska Stat. §§ 45.57.010-.120 (Supp. 1978); Ark. Stat. Ann. §§ 67-1264 to -1264.14 (Supp. 1977); Colo. Rev. Stat. §§ 11-51.5 -101 to 108 (Supp. 1976); Conn. Gen. Stat. §§ 36-347a to -347m (1977); Del. Code Ann. tit. 8, § 203 (Supp. 1977); Ga. Code Ann. §§ 22-1907 to -1915 (1977); Hawaii Rev. Stat. §§ 417E-1 to -15 (1976); Idaho Code §§ 30-1501 to -1513 (Supp. 1978); Act of Sept. 8, 1977, Pub. Act 80-556, Ill. Ann. Stat. ch. 121 1/2, § 137.5-1 (Smith-Hurd Supp. 1978); Ind. Code Ann. §§ 23-2-3-1 to -12 (Burns Supp. 1978); Iowa Uniform Securities Act §§ 502.102, .211-215 (1978), reprinted in 1A Blue Sky L. Rep. (CCH) ¶¶ 18,142, 18,161-165; Kan. Stat. Ann. §§ 17-1276 to -1285 (1974); Ky. Rev. Stat. §§ 292.560-.991 (Supp. 1978); La. Rev. Stat. Ann. §§ 51:1500-:1512 (West Supp. 1978); Me. Rev. Stat. Ann. tit. 13, §§ 801-817 (Supp. 1978); Md. Corp. & Ass'ns Code Ann. §§ 11-901 to -908 (Supp. 1977); Mass. Ann. Laws ch. 110C, §§ 1-13 (Michie/Law. Co-op. Supp. 1978); Mich. Comp. Laws Ann. §§ 451.901-.917 (Supp. 1978); Minn. Stat. Ann. §§ 80B.01-.13 (West. Supp. 1977); Miss. Code Ann. §§ 75-72-1 to -23 (Supp. 1978); Mo. Take-Over Bid Disclosure Act, 1978 Mo. Laws S.B. No. 820, reprinted in 2 Blue Sky L. Rep. (CCH) ¶¶ 28, 201-214; Neb. Rev. Stat. §§ 21-2401 to -2417 (1977); Nev. Rev. Stat. §§ 78.376 to -.3778 (1973); N.H. Rev. Stat. Ann. §§ 421:A to :15 (1977); N.J. Stat. Ann. §§ 49:5-1 to -19 (West. Supp. 1978); N.Y. Bus. Corp. Law §§ 1600-1614 (McKinney Supp. 1980); N.C. Gen. Stat. §§ 78B-1 to -11 (Supp. 1977); Ohio Rev. Code Ann. § 1707.041 (Page 1978); 70 Pa. Cons. Stat. Ann. §§ 71-85 (Purdon Supp. 1978); S.D. Comp. Laws Ann. §§ 47-32-1 to -47 (Supp. 1978); Tenn. Code Ann. §§ 48-2101 to -2114 (Supp. 1978); Utah Code Ann. §§ 61-4-1 to -13 (1978); Va. Code §§ 13.1-528 to -541 (1978); Wis. Stat. Ann. §§ 552.01-.25 (West Special Pamphlet 1978); Tex. Administrative Guidelines for Minimum Standards in Tender Offers 065.15.00.100-.800, reprinted in 3 Blue Sky L. Rep. (CCH) ¶ 46,615.

ensure that the shareholders of a target company are given adequate information of all the material facts concerning a takeover bid as well as the time in which to use such facts, so that they can make a fully informed decision whether to tender their shares and potentially whether to turn over control of the target corporation to the tender offeror.

In considering the question of federal preemption, the Court below identified the "crucial inquiry" as "whether the Illinois Act differs from the Williams Act in such a way that achievement of the congressional objective of investor protection is frustrated" 633 F.2d at 493, and proceeded to an analysis of specific provisions of the Illinois Act. The Court found the "most troublesome portion of the Illinois Act" to be the provision contained in the hearings section of the Act which in effect empowers the Illinois Secretary of State to pass upon the substantive fairness of a tender offer. Thus, the Court held that, "*to the extent that* Illinois has chosen to rely upon its Secretary of States' judgment after full disclosure of the relevant facts, its regulatory scheme stands in fundamental conflict with federal law and is therefore unconstitutional." 633 F.2d 494. (Emphasis added.)

Moreover, with respect to the question of whether certain delays, such as the pre-effective notification period, which are built into the Illinois statute are unacceptable on preemption grounds, the Court held that the Illinois Act "contained mechanisms for delay which are potentially grossly in excess of the delay mandated by Congress . . ." *Id.* at 498.

The Court's analysis thus appropriately focused on specific provisions of the Illinois Act which appeared to it to be in conflict with the "congressional judgment and analysis that tender offers may not be unduly hindered (by grossly extended delay under state law) to the detriment of investors." *Id.* Such an analysis is required

where there is, as here, "no irreconcilable conflict" with federal regulation in the field. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). Citing *Silver*, this Court has stated:

> [T]he proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'
>
> *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware, supra*, 414 U.S. at 127.

The Court of Appeals, erred, however, in determining that the Illinois Act "unduly hindered" tender offers when the record was devoid of any actual effect the Illinois Act had had on tender offers, 633 F.2d at 497.

If this Court were to agree that certain provisions of the Illinois Act are in conflict with the federal regulatory scheme, the extent of the conflict must be determined to preserve those portions of the states' statutory schemes that are not in conflict with federal law. In *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), this Court struck down in part and upheld in part a Washington statute regulating the design, size and movement of oil tankers on Puget Sound. It is urged that in the instant case, the Illinois Act must be similarly analyzed and those portions of the statute that are not in direct conflict with the Williams Act be preserved. *See, Merrill Lynch, Pierce, Fenner & Smith* v. *Ware, supra.*

Without conceding the invalidity of any of the provisions of the New York Security Takeover Disclosure Act, any more than any of the provisions of the Illinois Act, the State of New York recently amended its Act to avoid possible constitutional challenges while still affording shareholders the benefits of state regulation.* Six other

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* See discussion at pgs. 2-3, *supra*, L. 1980 ch. 733.

states have similarly amended their tender offer laws by statute or regulation.*

As amended, the New York Act charges the New York Attorney General with determining, upon commencement of a tender offer (as under the Williams Act) rather than 20 days prior to commencement, whether the offeror has provided full and fair disclosure to offerees of all material information concerning the takeover bid. The Attorney General may schedule a public hearing or order an investigation and in conjunction therewith, issue an order prohibiting an offeror from purchasing or paying for any shares tendered. N.Y.B.C.L. §§ 1604, 1605(a) (McKinney's). Prohibiting the purchase or payment for shares tendered, as opposed to prohibiting the continuation of the takeover bid, made the New York Act consistent with federal practice where the approval of a takeover is required by a federal regulatory authority, such as the Civil Aeronautics Board.** Even such prohibition, however, may not extend past fifty-five days after the filing of the registration statement N.Y.B.C.L. § 1605(a). This fifty-five day limitation was added to the New York Act in 1980 as a specific response to the claim that state tender offer statutes are used as instruments to indefinitely delay and defeat takeover bids. Fifty-five days was found to be the average number of days between the commencement and completion of a takeover bid.

The New York experience illustrates how state regulations can be harmonized with the federal regulatory scheme of the Williams Act so as to enhance and complement it in the interest of greater protection of shareholders.

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* Conn. Pub. Act No. 81-121 Amending ch. 661a of Conn. Gen. Stat.; Idaho Rule 602 A adopted pursuant to Idaho Code ch. 15, Title 30; Ind. Code 23-2-3-1 P.L. 1981, House Enrolled Act, No. 2067; Md. House Bill 1310, effective July 1, 1981; Nev. Senate Bill 359 ch. 417, NRS 78.3771; ch. 552 Wis. stat. as amended by ch. 16 Laws of 1981, effective June 17, 1981.

** See discussion pgs. 8 to 9, *supra*.

This Court has stated that,

> . . . federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained.
>
> *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra* 373 U.S. at 142.

There are no "persuasive reasons" that would lead to the preclusion of the states in the area of regulating tender offers for the securities of corporations within their jurisdiction.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Dated: New York, New York
July 17, 1981

Respectfully submitted,

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No. 80-1188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES EDGAR,

Appellant,

against

MITE CORPORATION AND MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AS *AMICUS CURIAE*

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Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae

The North American Securities Administrators Association, Inc. (NASAA), a national organization whose membership includes the securities law administrators of the 50 States (except California), hereby respectfully moves for leave to file the attached brief, as *amicus curiae* in this case. The consent of the attorney for the Appellant has been obtained. The consent of the attorney for the Appellees was requested but was neither granted nor opposed.

The interest of NASAA in this case arises from the fact that thirty-six (36) of its member states have enacted and administer state laws regulating take-over offers, and that more than a dozen of those laws have been declared unconstitutional by federal courts in the last eighteen (18) months on the same Supremacy Clause and/or Commerce Clause grounds enunciated in the lower court decisions in this case. Several of the decisions regarding the laws of other states are at various levels of the appeal process. The Court's decision in this case will have wide-ranging impact on those appeals and on a number of state take-over laws which may or may not have provisions identical to those in the Illinois take-over law, particularly including the laws of nine (9) states that have recently been amended to remove Supremacy Clause problems regarding areas of conflict with the federal take-over procedures and to remove Commerce Clause problems concerning adequate state interests in asserting jurisdiction that were part of the basis of the lower court's decision in this case.

In the instant case, the focus of the arguments of the appellant and the appellees in the Court of Appeals regarding the Supremacy Clause and the Commerce Clause issues was narrow, isolating on the provisions of the Illinois law vis-a-vis the federal law. Since it is likely that the same situation will exist in the treatment of issues

before this Court, it is believed that the brief which *amicus curiae* is requesting permission to file will contain a discussion of the issues on a wider scope to provide the Court with a broader perspective as to how state take-over laws are not violative of Constitutional standards.

Respectfully submitted,

.....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES EDGAR,

Appellant,

against

MITE CORPORATION AND MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The North American Securities Administrators Association, Inc. (NASAA) is a non-profit voluntary membership corporation. Membership in NASAA is open to all state and provincial securities regulators and agencies in the United States, Canada, and Mexico. Presently its membership includes the state officials charged with the enforcement of the blue sky laws of all the states (except California), the District of Columbia, and Puerto Rico as well as all the Canadian provinces. The purpose of the organization is to deal with issues of common interest, to further the enforcement of the state blue sky laws, and to coordinate such state statutes with the federal securities laws by cooperating with the Securities and Exchange Commission (SEC) in areas of mutual interest.

Thirty-five states in addition to Illinois have takeover laws similar in purpose to the one whose constitutionality is challenged in the case at bar.* Most of these statutes are administered by the state securities agencies which are the members of NASAA. The decision of this Court as to the constitutionality of the Illinois Business Take-Over Act (Illinois Act), Ill. Rev. Stat. ch 121 1/2 §§ 137.51 *et seq.*, will have far reaching impact upon these other state takeover statutes and NASAA members, as many of such statutes have one or more provisions identical or similar in purpose to those challenged in the present case. This case is the first in which this Court will consider takeover statutes on their merits, the Court having disposed of a previous appeal involving the Idaho takeover statute on venue grounds in *Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979).

Summary of Argument

The Illinois Act does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Williams Act. Therefore, the Illinois Act is not constitutionally preempted by the Williams Act, 15 USC § 78m(d)-(e) 78n(d)-(f) (1976), and the SEC Rules thereunder. While the Illinois Act as written, but not as interpreted by the Illinois Secretary of State, suggests that it regulates questions of substantive fairness in connection with takeover offers, such sub-

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* See State of New York, Amicus Brief, p. 22 n. for a citation of the individual statutes. For surveys of the different forms of state takeover regulation *see* E. Aranow, H. Einhorn & Berlstein, Developments in Tender Offers for Corporate Control 207-17 (1977); Langevoort, *State Tender Offer Legislation: Interests, Effects and Political Competency*, 62 Cornell L. Rev. 213,219-40 (1977) and Moylan, *State Regulation of Tender Offers*, 58 Marq. L. Rev. 687,689-98 (1975). None of these surveys, however, reflect the changes in the state schemes effected in 1980 and 1981. For a more recent, although still incomplete survey, *see* Shapiro, *State Takeover Laws*, in Practicing Law Institute, Twelfth Annual Institute on Securities Regulation 401-442 (1980). *See also*, Sec. Reg. & L. Rep. (BNA) (No. 606), F-1-F-4 (June 3, 1981).

stantive or merit regulation is not inconsistent with the Congressional mandates of the Williams Act. The Williams Act adopts a full disclosure standard at the federal level, but does not prohibit the application of traditional state blue sky law standards of substantive or merit review of such offers under the state acts including the Illinois Act. Any incidental delay which may result from the Illinois Act inures to the benefit of investors and is therefore not inconsistent with Congressional objectives under the Williams Act.

Congress has specifically permitted state regulation of tender offers. The Illinois Act is not only a securities regulatory statute in the traditional sense, but it is also an organic corporate statute. Because it is a hybrid statute, it serves two separate, but clearly legitimate interests of the State of Illinois. As a securities regulatory statute, it seeks to protect the investors in the target company residing in the State of Illinois. As an organic corporate statute it seeks to protect all investors, whether located within the State of Illinois or elsewhere, who own securities of corporations incorporated under Illinois law or which have a substantial nexus with the State by having their executive offices and 10% of their capital within the State. It accomplishes this goal by providing a rule applicable to all shareholders governing the change of control of the corporation similar to rules involving sale of assets, mergers, consolidations, reorganizations, and the solicitation of proxies. The benefits conferred upon the shareholders by the Illinois Act far outweigh any alleged burdens of compliance.

The decision of this Court should acknowledge the constitutionality of the Illinois statute in its entirety under both the Supremacy and Commerce Clauses. However, should the Court feel compelled to invalidate one or more provisions of the Illinois Act, it should limit its decision in order to preserve those portions of the Illinois Act and other state takeover statutes which are constitutional. Further, it should provide Illinois and the other states with guidance as to the specific constitutional infirmities

that the Court finds in the Illinois Act, so that Illinois and other states may adopt takeover statutes which will be constitutionally permissible.

ARGUMENT

POINT I

The Illinois Act is both a securities regulatory measure and an organic corporate statute dealing with internal corporate governance.

The key to the NASAA position on the constitutionality of the Illinois Act lies in its belief that the Act is a hybrid statute combining two different investor protection concepts into a single statute. In one respect, it is a traditional blue sky statute aimed at the protection of Illinois investors. At the same time, it is an organic corporate statute protecting investors wherever they are located in connection with the change of control of the target corporation. In this sense the Act is similar to other traditional organic corporate statutes which control the internal governance of a corporation in connection with mergers, consolidations, sales of assets, reorganizations, and the solicitation of proxies.

The key section is Section 137.52-10 which defines a "target company" and reads:

> 'Target Company' means a corporation or other issuer of securities (1) of which 10% of the outstanding securities of the class of its equity securities which is the subject of a takeover offer is held of record by securityholders located in this State as determined by post office address as shown on the records of the issuer, or (2) which meets any two of the following conditions:
>
> (a) has its principal executive office in this State;
>
> (b) is organized under the laws of this State;
>
> (c) has at least 10% of its stated capital and paid-in surplus represented in this State.

NASAA submits that the first of these jurisdictional bases, that dealing with 10% stock ownership within the state, is a traditional securities regulation provision aimed only at the protection of Illinois shareholders and clearly within the legitimate interests of the State of Illinois as will be seen in Point III. The second basis, dealing with incorporation within the state or substantial presence therein, is a conventional state corporate law concept aimed at providing internal governance rules for corporations in which Illinois has a strong state interest. Again, this state interest will be developed in Point III.

The Seventh Circuit in the present case and the Fifth Circuit in *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1280 n.53 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979), did not adequately evaluate the dual nature of the jurisdictional bases of the statute. Had they done so, NASAA submits that they would have reached an opposite conclusion on both the Supremacy and Commerce Clause issues. *See AMCA International Corp.* v. *Krouse*, 482 F. Supp. 929 (S.D. Ohio 1979); *Wylain, Inc.* v. *TRE Corp.*, 412 A.2d 338 (Del. Ch. 1980); *Sharon Steel Corp.* v. *Whaland*, Cas. No. 80-333, —— A.2d —— (N.H. July 2, 1981); *Strode* v. *Esmark, Inc.*, [1980] Fed. Sec. L. Rep. (CCH) ¶ 97,538 (Ky. Cir. Ct. 1980), *aff'd* —— S.W.2d —— (Ky. App. Apr. 3, 1981).

The dual nature of the statute was recognized by Professor Shipman in his article, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W. Res. L. Rev. 722, 740-756 (1970). He stated:

> An implicit premise of the Act is that a takeover bid is essentially an internal affairs matter—one involving the relationships *inter sese* of the corporation, its directors, officers, and stockholders—which Ohio may reasonably regulate on a global basis.

Id. at 741-742. He then discusses the pros and cons of such a position including the fact that Congress in adopt-

ing the Williams Act considered takeover bids to be similar to proxy fights. H.R. Rep. No. 1711, 90th Cong., 2d Sess. (1968).

Professor Shipman concludes:

> [F]or the tendering securityholder in a securities bid, the effects are similar to those resulting from a merger, a classic internal affairs transaction.

Id. at 744-45. This concept has been recognized by the majority of recent legal commentators who have written in the area. *See, e.g.*, McCauliff, *Federalism and The Constitutionality of State Takeover Statutes*, 67 Va. L. Rev. 295, 303-304 (1981); Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation*, 36 Wash. & Lee L. Rev. 733, 741-746 (1979); *Sargent, On the Validity of State Takeover Regulation: State Response to Mite and Kidwell*, —— Ohio St. L. J. —— (due for Oct. 1981 publication), manuscript at 58-61; Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U. L. Rev. 872, 931-934 (1978).

Two articles noted by the Seventh Circuit have rejected this concept on the basis that a takeover is nothing more than a collection of individual sales of securities. *Wilner & Landy, The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1, 16-17 (1976); Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. Cal. L. Rev. 1133, 1153-55 (1974). However NASAA suggests this approach is near-sighted and rather naive. If this were true there would be no need for the Williams Act or the state takeover statutes. The entire area could be regulated by the anti-fraud provisions of the federal and state securities acts.

As noted above, four courts have reached the conclusion that the dual nature of the takeover statutes is sound. NASAA would agree and urges the Court to concur.

POINT II

The Illinois Act is not preempted by the Williams Act.

The Court of Appeals based its conclusion that the Illinois Act is preempted by the Williams Act on its interpretation of the Congressional intent underlying the Williams Act:

> We therefore conclude, purely in light of the congressional judgment and analysis, that tender offers may not be unduly hindered (by grossly extended delay under state law) to the detriment of investors. We reiterate that we possess no independent insight, based on evidence or research, about what the effect of slight or interminable delay may be. But we think the perspectives informing congressional legislation are reasonably clear and are binding upon us. Therefore, we conclude that the Illinois Act is preempted by the Williams Act because the former (1) tends inordinately to substitute regulatory control for investor autonomy, (2) provides for hearings the institution of which may be indirectly delegated to incumbent management and which are potentially interminable in length, (3) provides for other delays and mechanisms for delay which are potentially grossly in excess of the delay mandated by Congress and deemed by Congress to be appropriate to the protection of investors and (4) provides for lengthly prenotification delay, a requirement Congress specifically rejected. 633 F.2d 498-9.

NASAA submits, however, that the Court of Appeals erred in its conclusion because it misinterpreted the intent of Congress in enacting the Williams Act and misconstrued the effect the Illinois Act would have on a tender offer.

NASAA agrees with the Court of Appeals that Congress has neither expressly barred the states from regulating tender offers, nor enacted so pervasive a regulatory

scheme that implicit preemption may be inferred. 633 F.2d 491. Congess has declared that states may regulate tender offers provided that such regulation is not in conflict wtih the Williams Act. Securities Exchange Act § 28(a), 15 U.S.C. § 78bb(a). *Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 182 (1979). Where there is no explicit or implicit preemption, the Illinois Act must be upheld absent a showing that it is in conflict with the Williams Act. *Jones* v. *Rath Packing Co.*, 43 U.S. 519, 525-526 (1977). *See Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963).

NASAA submits that the Seventh Circuit erred in holding that the Illinois Act conflicts with the Williams Act and that it is an obstacle to the execution of Congressional objectives. NASAA in this brief will consider two of the four grounds which the Seventh Circuit felt caused the preemption of the Illinois Act: (1) that the Illinois Act tends inordinately to substitute regulatory control for investor autonomy, and (2) that the Act provides for other delays and mechanisms for delay which are potentially interminable in length. NASAA will not address the remaining two points, but joins with the State of Illinois in its brief in urging the Court to reverse these grounds also.

NASAA has not addressed the point of prenotification because it believes that the Court need not deal with this issue or, in the alternative, need only consider it in the limited factual context of this case. Since the filing of the original complaint in this case, the SEC has adopted SEC Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (1980). This Rule created and was intended by the SEC to create a conflict between the prenotification filing requirements of the various state statutes and the Williams Act and the Rules thereunder. See SEC Exchange Act Rel. No. 34-1634, [1979] Fed. Sec. L. Rep. (CCH) ¶ 82,373 (Nov. 29, 1979). NASAA contends that such Rule exceeds the SEC statutory rule-making authority under the Williams Act. *See* Note, *Kneeling To The SEC Rules: The Vir-*

ginia Takeover Act and SEC Tender Offer Rule 14d-2(b), 22 Wm. & Mary L. Rev. 487 (1981). That issue has been litigated in *Canadian Pacific Enterprises, Inc.* v. *Krouse*, 506 F. Supp. 1192 (S.D. Ohio), *appeal pend.*, No. 81-3083, (6th Cir.), where the regulations were held to have been validly adopted. Because of the Ohio litigation, the pre-notification issue may not be ripe for final adjudication until the validity of SEC Rule 14d-2(b) is before the Court.

In the interim, several states have eliminated the pre-notification conflict with SEC Rule 14d-2(b) by amending their takeover laws by statute or rule.*

Likewise, a number of states have eliminated the provision which the Seventh Circuit found offensive in Section 147-57 A, *requiring* the Secretary to hold a hearing when asked by a majority of the directors of the target company or 10% of the shareholders.** Ill. Rev. Stat. ch. 121 1/2 § 137-57 A. It should be noted that the Seventh Circuit did not find offensive a hearing provision which was discretionary with the state agency upon the request of the directors or shareholders of the target company. 633 F.2d at 495 n. 18.

A. The Substantive Review Provision of the Illinois Act is not in conflict with the Williams Act.

The Seventh Circuit concluded that the substantive merit review provision of Section 137.57 E allowing the Secretary of State to determine that an offer was inequitable and to seek an injunction barring it was in conflict with the free market approach which it felt was the essence of the Williams Act.* The Seventh Circuit said:

Illinois' substitution of the judgment of its Secretary

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* Connecticut, Idaho, Indiana, New Hampshire and Wisconsin.

** 14 states originally had such requirements, at least five, Connecticut, Idaho, Indiana, New Hampshire and Wisconsin, have repealed these provisions.

* Twelve states originally had such a requirement: Hawaii, Idaho, Illinois, Indiana, Louisiana, Minnesota, Mississippi, New Jersey, South Dakota, Tennessee, Texas and Wisconsin. At least four, Idaho, Indiana, South Dakota and Wisconsin, have removed this provision.

> of State for an investor's own assessment of the equitability of a tender offer is patently inconsistent with the Williams Act . . . . [T]his approach to investor protection by benevolent bureaucracy is preempted by the conflicting approach of the Williams Act, which contemplates unfettered choice by well-informed investors. Both the House and Senate Reports observed that '[t]his Bill is designed to make the relevant facts known so that the shareholders have a fair opportunity to make *their* decision.' 633 F.2d at 494. *Footnotes and citations omitted.*

The key to the Seventh Circuit's position is the quote from the House and Senate Reports and a statement of SEC Chairman Cohen quoted at 633 F.2d at 494 n. 14 from *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency,* 90th Cong., 1st Sess. 33 (1967). If the quoted passage reflects Congressional intent to exclude any type of regulation other than disclosure regulation, as the Seventh Circuit claims, then the Court of Appeals is correct. However, it is NASAA's position that the quoted language does not support that interpretation. Rather, NASAA believes that the quoted language is nothing more than a statement to the effect that the Williams Act follows the approach of all the other federal securities-related statutes and relies on full disclosure rather than the merit approach often used at the state level in securities regulation. The same is true of Chairman's Cohen's statement. It is not a statement that he disagrees with the merit approach or that the full disclosure approach is the only permissible one compatible with the Williams Act, it is merely a statement that the SEC will follow its traditional approach of requiring full disclosure. In order to support its position, NASAA points to three specific items.

First, the Williams Act was made a part of the Securities Exchange Act of 1934. That Act contains Section 28(a) which this Court in *Leroy* v. *Great Western United Corp.,* 443 U.S. 173, 182 (1979) said "was plainly intended to protect, rather than to limit, state authority." As

NASAA noted in Point I, and as the Seventh Circuit observed, the takeover statutes were not the type of activities originally contemplated by Section 28(a) since that Section preserves the right of the states to regulate securities matters and it is NASAA's position that the takeover statutes are hybrid securities and organic corporate statutes. However, it is clear that Section 28(a) was intended to preserve the right of the states in securities areas to continue the "benevolent bureaucracy" approach of fair, just, and equitable review which had long existed at the time of the passage of both the Securities Act of 1933 and the Securities Exchange Act of 1934.

At the time of the passsage of the Williams Act, there was only one state takeover statute, the Virginia Act, Va. Code 1950 §§ 13.1-528 *et seq.*, a disclosure statute. Therefore, NASAA believes that the SEC and Congress did not form a strong opinion for or against merit regulation of takeovers. As evidenced by the legislative history quoted by the Seventh Circuit, it merely continued the traditional federal pattern of disclosure regulation. However, NASAA submits that what limited opinion there was favored the continuation of the existing pattern of complementing state merit regulation.

The key to Congressional intent, NASAA submits, lies in the fact that Congress elected to insert the Williams Act into the existing Exchange Act which already contained Section 28(a). In 1968, under Section 28(a), state merit regulation and federal full disclosure had successfully co-opted for some 34 years in the securities area. Their complementary, rather than conflicting, nature was well known and considered desirable. NASAA urges that, by inserting the Williams Act in the 1934 Act, Congress consciously elected to continue this established complementary pattern into the takeover area as state statutes developed.

This conclusion is further supported by NASAA's second and third points. The SEC, the agency charged with

administratively interpreting the Williams Act, has consistently taken the position that merit regulation of takeovers in state or federally regulated industries, such as insurance, banking, and public utilities, is not inconsistent with the Williams Act. Nor did Congress itself consider merit regulation inconsistent with the Williams Act when it later passed the Hart-Scott-Rodino Act requiring substantive review in the anti-trust field.

Second, the SEC is on record as indicating that merit regulation is consistent with the Williams Act in connection with certain regulated industries. In SEC Exchange Act Rel. No. 16384, [1979] Fed. Sec. L. Rep. (CCH) ¶ 82, 373 (Nov. 29, 1979), at p. 82, 584, the Commission acknowledged the validity of federal merit review of regulated industry takeovers when it said:

> Thus, it appears that a tender offer which is appropriately conditioned upon obtaining the necessary regulatory approval may be published or sent or given in compliance with Rule 14d-2(b) without conflicting with such statutes.

See also Exchange Act Rel. No. 34-16623, 17 C.F.R. § 241.6623, 3 Fed. Sec. L. Rep. (CCH) ¶ 24, 2841 (Mar. 5, 1980), question and answer 5.

Both the SEC and the District Court recognized the right of a state to conduct merit regulatory review of a regulated industry in *Sun Life Group, Inc.* v. *Standard Life Ins. Co.*, [1979-80] Fed. Sec. L. Rep. (CCH) ¶ 97,314 (S.D. Ind. 1980); Memorandum of Securities and Exchange Commission, Amicus Curiae, *Sun Life Group* v. *Standard Life Ins. Co.*, C.A. No. IP 80-246-C (S.D. Ind.), dated Mar. 12, 1980 at 4-5.

Finally, Congress itself subjected takeover bids to merit regulation when it passed the provisions of the Hart-Scott-Rodino Antitrust Improvements Act in 1976 requiring antitrust review by the Department of Justice the Federal Trade Commission (FTC). 15 U.S.C. § 18a (1976).

If merit regulation in regulated industries at both the state and federal level and substantive review for anti-

trust purposes are consistent with the Williams Act, then why is not merit regulation under state takeover acts also consistent? Review under the Hart-Scott-Rodino Act and by regulatory agencies other than the securities commissioners clearly interfere with the free market concept which the Seventh Circuit finds paramount in the Williams Act. Yet such review is clearly contemplated. NASAA submits that merit review under the state takeover statutes is also consistent with the Williams Act and that the Seventh Circuit was in error concluding otherwise.

B. The delay caused under the hearing provision of the Illinois Act does not make it in conflict with the Williams Act.

The Seventh Circuit concluded that the delay caused by the hearing provision of the Illinois Act, Ill, Rev. Stat., ch. 121 1/2 § 137.57, caused the Illinois statute to be in conflict with the Williams Act. The essence of its holding is found in the following statement:

> [T]here is no evidence in the record about what actual effect of the potential for delay, inherent in the Illinois Act, has been. In absence of such evidence we ought not to second-guess Congress' judgment that delay grossly in excess of that contemplated by the Williams Act redounds to the detriment of stock holders by substantially deterring the making of tender offers.

633 F.2d at 498.

NASAA submits that this statement contains three conclusions, all of which are incorrect. First, it concludes that the delay under the Illinois Act is "*grossly in excess*" of what is allowed in the Williams Act. Second, it concludes that Congress felt that delay was contrary to the purpose of the Williams Act. And finally, it concludes that delay is detrimental to investors.

The Illinois Act provides for a hearing to be called within 15 business days after the filing and the hearing

to be held within 10 business days after the request. Ill. Rev. Stat., ch. 121 1/2, §§ 137.57 A, C. There is no time set for the hearing to be concluded, but the Secretary must render his decision within 15 business days after the conclusion of the hearing. Thus, as a maximum the process will take 40 business days after the filing excluding the time necessary for the hearing. This is a maximum; there is no indication that in actual practice that such would be the case. Is this delay grossly in excess of the time under the Williams Act?

As the Seventh Circuit and most people prior to the adoption of SEC Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (1980), contemplated, the offeror would file his notice with the states 20 days *before* making the offer under the Williams Act. In fact, SEC Rule 14d-2(b) was specifically adopted to place the Williams Act in conflict with this 20 day pre-filing provision. Thus, the 40 business day period under the Illinois Act began to run 20 business days *before* an offer was made under the Williams Act. Therefore, half of the hearing delay runs before the Williams Act comes into play.

The Williams Act itself requires a 10 day waiting period. Because the SEC found that this period was too short and tipped the supposedly neutral scheme of the Williams Act too much in favor of the offeror, *see* SEC Exchange Act Rel. No. 34-16384, [1979-80] Fed. Sec. L. Rep. (CCH) ¶ 82,373 (Nov. 29, 1979), Rule 14e-1, 17 C.F.R. § 240.14e-1 (1980), requiring the offer to be open for a period of 20 business days was adopted. When the remaining 20 business day delay is measured against this standard, NASAA submits that it is not grossly excessive.

Further, NASAA submits that Congress does not object to delay under the Williams Act. Much of the legislative history which the Seventh Circuit used to support its conclusion came from its consideration of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (1976). However, that Act requires a filing with the FTC and the Department of Justice in the case of certain takeover offers. There follows a 15 day wait-

ing period which can be extended another 10 days by the Justice Department or the FTC. Thus, in connection with tender offers, there is superimposed a 25 day potential administrative delay mandated by the Hart-Scott-Rodino Act. This administrative delay can be further extended by court order. It is hard to reconcile such delay under that Act with the conclusion of the Seventh Circuit that the Williams Act does not allow delay.

Finally NASAA submits that there is much evidence that delays are helpful to investors and not detrimental. Indeed, studies demonstrate that during the period between 1974 and 1980, taking all competitive hostile takeover bids into consideration, shareholders reaped $1.7 billion in premiums over the original offer price (rather than the lower market price), which premiums are attributable to extended time periods under state takeover laws. *See, e.g., Is the Takeover Game About to End,* 15 Financial World 59-60 (March 15, 1981); Chatlos, *The SEC vs. Investors on Tender Offers,* 56 Harv. Bus. Rev. 6-8 (Sept.-Oct. 1978). Another study of thirty-six unsolicited tender offers which were rejected by the target company between the end of 1973 and June 1979 indicates that more than half of the targets have their securities presently selling on the open market for more than the rejected offering price or were taken over by another company at a price higher than the first offering price. Lipton, *Takeover Bids in the Target's Boardroom,* 35 Bus. Law. 101, 106 (1979); Note, *Kneeling to The SEC Rules: The Virginia Takeover Act and SEC Tender Rule 14d-2(b),* 22 Wm. & Mary L. Rev. 486, 513 (1981). Still another study of 85 takeovers from January 1, 1976 to June 8, 1979, shows that in the case of virtually every company which initially resisted takeover and was subsequently acquired, the shareholders have received a price higher than the original offering price. Unpublished Study of Goldman, Sachs & Co., *cited in* Note, *Kneeling to The SEC Rules: The Virginia Takeover Act and SEC Tender Offer Rule 14d-2(b), supra.*

This type of information has led at least three courts to conclude that the delay caused by state takeover stat-

utes similar to that of Illinois is not inconsistent with the Williams Act. *AMCA International Corp.* v. *Krouse*, 482 F. Supp. 929 (S.D. Ohio 1979); *Strode* v. *Esmark*, [1980] Fed. Sec. L. Rep. (CCH) ¶ 97,538 (Ky. Cir. Ct. 1980), *aff'd* —— S.W.2d —— (Ky. App. Apr. 3, 1981); *Sharon Steel Corporation* v. *Whaland*, Cas. No. 80-333, —— A.2d —— (N.H. July 2, 1981). NASAA submits that this Court should so hold in the case at bar.

POINT III

The Illinois Statute Reasonably Regulates Legitimate and Important State Interests.

The plenary authority to regulate interstate commerce is given to Congress under the Commerce Clause. *Gibbons* v. *Ogden*, 22 U.S. 23 (1824). This power does not prevent the states from adopting legislation on matters affecting interstate commerce. Rather, states have always retained their authority to govern in areas of local concern. *See e.g., Southern Pacific Co.* v. *Arizona, ex rel. Sullivan*, 325 U.S. 761, 767 (1945). A successful challenge to the Illinois Act or any other such statute must overcome a strong presumption of the statute's validity and demonstrate that the statute not only does not further legitimate important state interests, but also that it impermissibly burdens interstate commerce.

A. There is a strong presumption of validity of state legislation in areas traditionally within the regulatory powers of the states, such as shareholder relations with corporations and corporate mergers, combinations, and change of control.

A strong presumption of validity of state legislation exists in areas traditionally within the police powers of the state. *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959). This presumption of validity cannot be overcome unless the local benefits are "so slight or problematical as not to outweigh the national interest . . .". *Southern Pacific Co.* v. *Arizona*, 325 U.S. at 776. Thus,

under the Commerce Clause, a state statute with respect to a legitimate state interest will be sustained unless the burden of interstate commerce is clearly shown to outweigh the state interest. *See also, O'Gorman* v. *Hartford*, 282 U.S. 251 (1931). As this Court said in *Boston & Maine Railroad Co.* v. *Armburg*,

> The interstate commerce clause did not withdraw from the states the power to legislate with respect to their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce and persons engaged in it.

285 U.S. 234, 238 (1932). Moreover, when a state statute is challenged under the Commerce Clause, it must be presumed that the historic police powers of the state were constitutionally exercised. *See e.g., Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947).

This presumption of constitutionality is particularly important in areas such as corporate regulation which have been traditionally left to the states, *see, e.g., Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 479 (1977); *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 40-41 (1977), and securities regulation where the federal and state governments have shared regulatory responsibility. *See, e.g., Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917); *Merrick* v. *N.W. Halsey & Co.*, 242 U.S. 568 (1917); *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917).

B. The Illinois Act does regulate a legitimate and legislatively-determined important interest of the State of Illinois.

The key to determining whether the Illinois Act regulates a legitimate and important interest of the State of Illinois is to examine the purpose for which the statute was passed. The acknowledged purpose of the Illinois Act, like all other takeover statutes and the Williams Act itself, is investor protection. *Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977). However, the protection afforded under

the Illinois Act, like most takeover statutes, is not limited to Illinois investors. The Illinois Act is clearly intended to have extraterritorial effect. Under Section 137.57 E, the Illinois Secretary of State is required to determine, if a hearing is held: (1) that the offer makes full and fair disclosure; (2) that it is not inequitable; and (3) that the offer is being made to Illinois offerees on substantially equal terms. Ill. Rev. Stat. ch 121 1/2 § 137.57 E. If he determines that these conditions are not met then he is empowered to seek an injunction under Section 137.62 against the making of the offer, not only in the State of Illinois, but elsewhere as well. Ill. Rev. Stat. ch 121 1/2 § 137.62.

It is this extraterritorial effect of the statute which caused the Seventh Circuit in the case at bar and the Fifth Circuit in *Great Western United Corp.* v. *Kidwell, supra,* to include that the Illinois and Idaho Acts, respectively, did not serve legitimate state interests. NASAA submits that both courts reached an improper conclusion on the state interest issue because neither court adequately considered all the jurisdictional bases of the statutes as identified in the statutes themselves.

The Illinois Act in Section 137.52-10 indicates two separate jurisdictional bases: (1) if 10% of the outstanding securities of the class of equity securities subject to the tender offer are owned by Illinois security holders of record; or (2) if any two of the following three conditions are present (a) the target company has its principal executive office in Illinois; (b) target company is organized under the laws of the State of Illinois; or (c) the target company has at least 10% of its stated capital and paid-in surplus in the state. Ill. Rev. Stat. ch. 121 1/2 § 137.52-10.

NASAA submits that the first of these is a traditional securities regulation basis. Except as noted below in subpoint E, where it is necessary to give extraterritorial effect to the local statute to protect the effect of the statute within the enacting jurisdiction, such statutes are not to

be given extraterritorial effect. Thus, the primary goal here is not to protect investors in general wherever they live, but rather to protect Illinois investors. To do so, however, may require that Illinois incidentally protect other states' investors also. The second jurisdictional basis, however, is not a securities regulation basis, but derives from organic corporate law. It does not purport to protect only the Illinois investors, rather it purports to protect all the securities holders of the target corporation wherever they are located.

C. Illinois as a matter of organic corporate law has a legitimate interest in having its statutes applied extraterritorially to govern the internal affairs of any corporation organized under its laws.

The first branch of the second jurisdictional basis is that the target company is an Illinois corporation because it is organized under the laws of Illinois. It has long been recognized by this Court and commentators that the corporate law of a particular state will be given extraterritorial effect when governing the internal affairs of a corporation. *See, e.g., Bank of Augusta* v. *Earle*, 38 U.S. (12 Pet.) 519 (1839); Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Scope of Full Faith and Credit*, 58 Colum. L. Rev. 1118 (1958); Latty, *Pseudo-Foreign Corporations*, 65 Yale L.J. 137 (1955). The application of the law of the place of incorporation has also been applied to extraordinary corporate transactions such as mergers, consolidations, and other reorganizations. *See, e.g.*, Cowett, *Reorganizations, Consolidations, Mergers, and Related Corporate Events Under the Blue Sky Laws: Part II— Constitutional Considerations*, 13 Bus. Lawyer 760, 766 (1958), where Mr.Cowett takes the position that the blue sky law of the state in which the investors are located would not apply, but that the law of the state of incorporation would control.

As pointed out in Point I, NASAA takes the position that a takeover bid involves not only the collective sale

by individual shareholders, but also the effective transfer of control of the corporation. Therefore, a takeover bid should not be treated exclusively as a securities regulation matter, but should be treated as a matter involving the internal governance of the corporation as well. This latter element —— the internal governance aspect —— is traditionally regulated by state organic corporate law. Thus, as to this aspect, takeover bid regulation is an organic corporate matter governed not by securities concepts but rather by state organic corporate law principles.

The Seventh Circuit in the case at bar, as did the Fifth Circuit in *Kidwell, supra,* 577 F.2d at 1280 n.53, recognized the validity of the extraterritorial application of the takeover statutes had the target corporation involved been incorporated in either Illinois or Idaho. This conclusion coupled with the above discussion would suggest that incorporation within the state alone would provide the necessary state interest to prevent invalidation on Commerce Clause grounds because of the extraterritorial application of the statute. It was so held in *Wylain, Inc.* v. *TRE Corp.,* 412 A.2d 338 (Del. Ch. 1980), where the Delaware court concluded that the Delaware Takeover Statute was constitutional whether classified as an internal governance statute or merely regulating affairs between corporate shareholders and third parties.

The Illinois statute does not attempt to occupy the entire constitutionally acceptable field, but requires the presence of one or the other of the two remaining jurisdictional branches within the second basis. Other courts have held that incorporation plus additional state interest are sufficient to support a takeover statute. *AMCA International Corp.* v. *Krouse,* 482 F. Supp. 929 (S.D. Ohio 1979); *Strode* v. *Esmark* [1980], Fed. Sec. L. Rep. (CCH) ¶ 97,538 (Ky. Cir. Ct. 1980), *aff'd* —— S.W.2d —— Ky. App. April 3, 1981). Chicago Rivet in the case at bar was not an Illinois corporation; consequently this jurisdictional branch was not applicable.

D. Illinois as a matter of organic corporate law has a legitimate interest in having its statutes applied extraterritorially to govern the internal affairs of any corporation which has its executive office in the state or which has at least 10% of its stated capital and paid-in surplus in the state.

The second and third jurisdictional branches are that the target corporation had its executive office in Illinois and that it had 10% of its capital and paid-in surplus in the state. These items will be considered together since the Illinois Act requires two out of the three branches to be present before jurisdiction attaches and the necessary state interest would be supplied by the fact of incorporation within the state if that were one of the two branches. Further, it appears that these were the two items relied upon by the Illinois Secretary of State.

The Seventh Circuit did not address these jurisdictional grounds in its opinion. The Fifth Circuit dismissed similar grounds under the Idaho statute in a single footnote. *Kidwell, supra,* 577 F.2d at 1280 n. 53. With due respect to both courts, NASAA submits that this constituted an error of major proportions. While it has long been recogtnized, as oulined in previous subpoint III B that the law of the state of incorporation will normally govern the internal operations of a corporation, in recent years there has been growing recognition by both the courts and the legal commentators that a state, other than the state of incorporation, may have a sufficient nexus with a particular corporation to replace the law of incorporation with its own substantive corporate law. *See, e.g., German-American Coffee Co.* v. *Diehl,* 216 N.Y. 57, 109 N.E. 875 (1915) (per Cardozo, J.); *Toklan Royalty Corp.* v. *Tiffany,* 193 Okl. 120, 141 P.2d 571 (1943); *State ex rel. Weede* v. *Iowa Southern Utilities Co.,* 231 Iowa 784, 2 N.W.2d 372, *supplemental opinion,* 4 N.W.2d 869 (1942); Latty, *Pseudo-Foreign Corporations,* 65 Yale L.J. 137 (1955); Kaplan, *Foreign Corporations and Local Corporate Policy,* 21 Vand. L. Rev. 433 (1968); Baraf, *The Foreign Corpora-*

tion—A Problem in Choice-of-Law Doctrine, 33 Bklyn. L. Rev. 219 (1967).

New York has long imposed certain provisions of its corporate statutes on foreign corporations doing business in New York. The original statute enacted in 1897, N.Y. Sess. Law 1897, ch. 384, § 4, did not place any limitations on the applicability of these sections other than that the corporation had to be doing business in New York. Kaplan, *Foreign Corporations and Local Corporate Policy,* 21 Vand. L. Rev. 433, 448 (1968). In the more than sixty years that this statute was in effect it was never challenged on constitutional grounds even though there were numerous cases brought under it imposing liability outside the borders of New York. *Kaplan, supra,* at 449. *See generally,* Baraf, *The Foreign Corporation—A Problem In Choice-of-Law Doctrine,* 33 Bklyn. L. Rev. 219 (1967). In 1963, the New York statute was amended to limit the application to corporations which did more than 50% of their business in New York and were not listed on a national stock exchange. See H. Henn, Appendix 4, Checklist 10, "Foreign Corporations", in 2 N.Y. Bus. Corp. Law 636-643 (McKinney 1963).

While originally applied by Professor Latty to corporations which had all of their business and most of their shareholders in a state other than their state of incorporation, the reach of the doctrine was extended by Professor Kaplan to "quasi-foreign" corporations and "national" corporations. He defined a "national" corporation as one which is incorporated in one state, has its main office in another, and business activities scattered throughout the country. Kaplan, *supa,* at 439. A "quasi-foreign" corporation he defined as a corporation incorporated in one state but doing business in two or three other states in relatively equal shares. Kaplan, *supra,* at 439.

Even commentators such as Professors Reese and Kaufman and Mister Cowett, who argue strongly for the application of the law of the state of incorporation, recognize the validity of the pseudo-foreign corporation con-

cept and the ability of the host state to impose its law. Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit,* 58 Colum. L. Rev. 1118 (1958); Cowett, *Reorganizations, Consolidations, Mergers, and Related Corporate Events Under the Blue Sky Laws,* 13 Bus. Lawyer 760, 766 (1958).

None of these authorities find that the imposition of the local corporate law on a foreign corporation by the host state is unconstitutional. Professor Kaplan summarized saying:

> There is apparently no constitutional barrier presently raised against such action by the host state; it also appears within the power of the host state to impose conditions of entry which require that the foreign corporation be bound by specified statutory requirements concerning the internal affairs of the corporation.

Kaplan, *supra,* at 460.

This Court has considered and upheld provisions of the California Corporation Code imposing liability upon shareholders of a foreign corporation doing business in California. *Pinney* v. *Nelson,* 183 U.S. 144 (1901) and *Thomas* v. *Mathiessen,* 232 U.S. 221 (1914).

The application of the pseudo-foreign corporation doctrine has also been approved by a number of commentators as a proper justification for state jurisdiction under state takeover statutes similar to the Illinois provision. Professor Shipman, discussing the Ohio Takeover Act, recognized the extraterritorial effect of the Act and justified it on the basis of the pseudo-foreign corporation doctrine. Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 Case W. Res. L. Rev. 722, 751-756 (1970). He indicates that he feels that the legislature has sufficient nexus with any "Ohio-based" corporation to sustain the application of the Ohio Takeover Act to that corporation. *Id.* at 755. He then defines an Ohio-based corporation to include cor-

porations having either its principal place of business or substantial assets in the state.

Professor Shipman's position was later adopted by the American Law Institute and Professor Loss in drafting the proposed Federal Securities Code. The Code in Section 1904(c) pre-empts all state takeover statutes except those which limit their regulation to takeovers involving corporations which have their *principal place of business* within the regulating state as well as 50% or more of their shareholders, either legally or beneficially, located in the state. American Law Institute, Federal Securities Code Proposed Official Draft § 1904(c) (1980). This same scheme was recommended to Congress by the SEC in its proposed amendments to the Williams Act. S. 3188, 96th Cong., 2d Sess. § 10. While this provision does require the additional nexus of stock ownership within the state, it clearly recognizes that a state other than a state of incorporation, the state *where the principal place of business is located*, the equivalent of the Illinois requirement of the corporate executive office be located within the state, does have a legitimate interest in regulating takeover bids for corporations not incorporated within the state.

As to the necessity of coupling the principal place of business requirement with stock ownership, Professor Kaplan, commenting upon the New York provisions discussed above, which required 50% of foreign corporate business within the state before application said:

> Whether the criteria selected by New York as broad or as comprehensive as they might constitutionally be, *is unlikely*. Another state, following the same theory of defining the area in which its desires to have its local policy applied, might select other criteria, thereby embracing different categories of foreign corporations.

Kaplan, *supra*, at 449. *Emphasis added.*

NASAA submits that the requirement that the principal place of business or executive office located within the

state, as under the Illinois Act, is sufficient nexus to provide legitimate state interest so that the host state may regulate he takeovers of such corporations. However, clearly, this state interest is present when the principal place of business concept is joined with some other nexus such as stock ownership, assets located in the state, or, as in the Illinois Act a percentage of capital located within the state.

This position won favorable approval from the Supreme Court of New Hampshire in the most recently decided takeover case. *Sharon Steel Corp.* v. *Whaland,* Case No. 80-333, —— A.2d —— (N.H. July 2, 1981). N.H. RSA § 421-A:2 VI defines a takeover bid to include a bid for the securities of any corporation formed under the laws of New Hampshire; having its principal place of business in New Hampshire; or having its principal executive office in the state. Sharon Steel Corporation made an offer for the stock of Nashua Corporation. Nashua was a Delaware corporation with its principal place of business in New Hampshire and between 10-15% of its shares were owned by New Hampshire residents. The court turned back a claim that the statute was a burden on interstate commerce saying:

> The State of New Hampshire has a legitimate local interest in regulating takeover attempts involving a possible change of control of companies headquartered in this State who likely would have a disproportionately large percentage of stockholders located here.

Slip Opinion at 14-15.

NASAA echoes the statement of the New Hampshire court and urges the Court to find, contrary to the Seventh Circuit, that the State of Illinois had a legitimate state interest in controlling the possible change of control of Chicago Rivent under the standards of the Illinois Act. Chicago Rivet had its headquarters in Illinois and apparently more than 10% of its capital and paid-in surplus there. Further, as the Seventh Circuit identified, 27% of Chicago Rivet's shareholders of record were Illinois residents and they held 43% of Rivet's outstanding shares.

633 F.2d at 501. Thus under the facts of the case at bar, the Illinois jurisdictional tests are more than met, and Illinois has a strong and legitimate state interest in the transfer of control of Rivet, even though Rivet is not an Illinois corporation.

E. Where Illinois has a legitimate state interest, the protection of such interest will not be defeated under the Commerce Clause because protection of that interest requires that state action to be given extraterritorial effect.

This Court in a long series of cases has held that the mere fact that local action also has a non-local effect does not necessarily vitiate a state scheme of regulation. *See, e.g., Minnesota* v. *Clover Leaf Cremery Co.*, —— U.S. ——, 66 L. Ed. 647, 649 (1981); *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 440 (1978) *Huron Cement Co.* v. *Detroit*, 362 U.S. 761, 770 (1945). NASAA submits that the Court should reach the same conclusion when the State of Illinois acts upon the first of its jurisdictional bases—when 10% or more of the outstanding shares sought are owned by Illinois residents. Ill. Rev. Stat. ch 121 ½, § 137.52-10(1). Here, clearly, the State's interest is in protecting the shareholders resident within its borders, and not protecting the residents of other states. Both the Seventh Circuit in the present case and the Fifth Circuit in *Kidwell, supra*, acknowledged that protection of its own citizens would be a legitimate state interest.

The problem seen by the Fifth Circuit in *Kidwell* and the Seventh Circuit in the present case is the extraterritorial effect of the state agency's action under the takeover statute. NASAA submits that the non-local impact under this jurisdictional bases is merely incidental, albeit necessary to protect the local Illinois interest of Illinois investor protection. Without the extraterritorial effect of the state action to stop the entire takeover bid, the takeover could be completed and control of the corporation shifted to the detriment of Illinois and its shareholders. An injunction which was limited in its scope to restrain-

ing the takeover bid within the borders of Illinois would be ineffective. *Western Airlines, Inc.* v. *Sobieski*, 191 Cal. App.2d 399, 12 Cal. Rptr. 719 (1961), *subsequent decisions Western Airlines, Inc.* v. *Schutzbank*, 258 Cal. App.2d 291, 66 Cal. Rptr. 293 (1968) and *People* v. *Western Airlines, Inc.*, 258 Cal. App.2d 286, 66 Cal. Rptr. 316 (1968). The offeror could merely purchase the securities necessary to complete his takeover from shareholders residing in other states. Thus while the takeover would clearly impact upon Illinois and its residents, Illinois would be powerless to act.

There are a number of situations involving corporations where state statutes which are normally accorded only territorial effect are allowed to impact outside the state's boundaries without running afoul of the Commerce Clause. The state anti-trust laws are one such example. *See* Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation*, 36 Wash. & Lee L. Rev. 733, 744 (1979). In *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909), where Argansas was allowed to exclude a corporation from doing business in the state for anti-trust activity which took place outside Arkansas and which had no impact within the state. *See also Exxon* v. *Governor of Maryland*, 437 U.S. 117 (1978); *Osborn* v. *Ozlin*, 310 U.S. 53 (1940).

Another example is the New York foreign corporation restrictions discussed in the last subpoint. One of these restrictions is on the ability of the foreign corporation to pay dividends when allowed by the state of incorporation, but not allowed by New York law. If this provision was not given extraterritorial effect, New York could prohibit the payment of dividends to New York residents, but not the payment to non-residents. This would defeat the purpose of the statute which is to prevent the dissipation of corporate assets and would cause shareholders to be treated unequally. In a series of cases, the New York restrictions have been upheld. *Irving Trust Co.* v. *Maryland Casualty Co.*, 83 F.2d 168 (2d Cir.) (per

L. Hand, J), *cert. denied*, 299 U.S. 571 (1936); *International Ticket Scale Corp.* v. *United States*, 165 F.2d 358 (2d Cir. 1948); *International Paper Co.* v. *United States*, 88 F. Supp. 891 (Ct.Cl. 1950); *German-American Coffee Co.* v. *Diehl*, 216 N.Y. 57, 109 N.E. 875 (1915) (per Cardozo, J.), discussed in Baraf, *The Foreign Corpoartion—A Problem in Choice-of-Law* Doctrine, 33 Bklyn. L. Rev. 219 (1967).

Probably the best example of the extraterritorial application of a state statute designed to protect local interest is *Western Airlines, Inc.* v. *Sobieski*, 191 Cal. App.2d 399, 12 Cal. Rptr. 719 (1961); *subsequent opinions Western Airlines, Inc.* v. *Schutzbank*, 258 Cal. App. 291, 66 Cal. Rptr. 292 (1968) and *People* v. *Western Airlines*, 258 Cal. App.2d 286, 66 Cal. Rptr. 316 (1968). This case is directly in point in that the California Corporation Commissioner determined that the amendment of Western's charter to eliminate cumulative voting constituted a sale of securities under the California Securities Act and was not fair, just, and equitable. Western was a Delaware corporation and a Delaware court had ordered the airline to elect its directors under straight voting according to the amended charter. The California Commissioner sought and received an injunction prohibiting such election. The appellate court upheld the Commissioner against constitutional attack. 191 Cal. App.2d 399, 411, 12 Cal. Rptr. 719, 727 (1961). *See also*, Kaplan, *supra*, 453-457.

In this case granting an injunction which was only effective in California would not work. In order to protect the California interest in seeing that the change in voting rights was fair, just, and equitable, it was necessary to bar straight voting by all shareholders whether located in or outside California.

NASAA submits that the same is true in the present case. To allow a takeover offer to continue in violation of the Illinois Act outside Illinois would have the effect of undercutting the legitimate state interest of protecting Illinois investors. Therefore the protection of

non-Illinois investors is merely incidental to an act aimed at the protection of Illinois' own residents and should be held not to violate the Commerce Clause. Illinois does have a valid interest to protect and has used the only method available to it to protect that interest. *See also Travelers Health Association* v. *Virginia ex rel. State Corporation Commission,* 339 U.S. 643 (1950) and *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U.S. 177 (1938).

F. The Illinois statute does not place an impermissible burden on interstate commerce when weighed against the legitimate local interest sought to be protected.

Both the Seventh Circuit in the present case and the Fifth Circuit in the *Kidwell* case, *supra,* spent little time attempting to balance the state interests claimed against the purported burden of interstate commerce as required by this Court's decision in *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970). Judge Wisdom in *Kidwell, supra,* at 1286 disposed of the issue by the conclusory statement that: "Idaho's law halted over 31 million dollars of interstate commerce." The Seventh Circuit made reference to a 23 million dollar impact and the fact that two or more states *might* attempt to assert *jurisdiction,* admitting that this was muted by the comity provision in the Illinois Act, allowing Illinois to defer to another state. 633 F.2d at 502 n. 31. The Seventh Circuit did not point out that Pennsylvania, the only other state which appeared to have any interest in the takeover of Chicoga Rivet, refused to take jurisdiction of the takeover.

This leads NASAA to believe that the real issue is whether the states have sufficient local interest to adopt takeover statutes and once this has been decided favorably to them, there will be little problem with the balancing issue. In light of this conclusion, NASAA will not extend its *amicus* brief on this issue beyond several very simple observations, but will adopt the arguments made on this point by the State of Illinois in its brief and by the State of New York in its *amicus* brief.

The statements by the Seventh and Fifth Circuit are merely conclusory. In fact, the takeover statutes do not in any real way prohibit takeover offers, merely require them to go forward under additional regulation for the protection of investors. Several courts have found that the takeover statutes have not in any way inhibited takeovers at all in that the number of takeovers has vastly increased even though the number of takeover statutes has likewise increased. *See, e.g., AMCA International Corp.* v. *Krouse,* 482 F. Supp. 929 (S.D. Ohio 1979); *Sharon Steel Corp.* v. *Whaland,* Cas. No. 80-333, —— A.2d —— (N.H. July 2, 1981); *Strode* v. *Esmark, Inc.,* [1980] Fed. Sec. L. Rep. (CCH) ¶ 97,538 (Ky. Cir. Ct. 1980), aff'd —— S.W.2d —— (Ky. App. Apr. 3, 1981). *See also, Telvest, Inc.* v. *Bradshaw,* 618 F.2d 1029 (4th Cir. 1980) and Note, *Kneeling to the SEC Rules: The Virginia Takeover Act and SEC Tender Offer Rule 14d-2(b),* 22 Wm. & Mary L. Rev. 487, 513 (1981).

NASAA submits that the balancing of the legitimate state interests established above when balanced against any purported burden on interstate commerce will necessarily come down on the side of the constitutionality of the state statutes. *See e.g.,* McCauliff, *Federalism and The Constitutionality of State Takeover Statutes,* 67 Va. L. Rev. 295, 303-305 (1981); Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western,* 53 N.Y.U. L. Rev. 872, 939 (1978).

CONCLUSION

The decision of the Court of Appeals should be reversed.

Dated: New York, N.Y.
July 17, 1981

Respectfully submitted,

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CASE NO. 80-1188

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES EDGAR,

Appellant,

v.

MITE CORPORATION, and
MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATE OF OHIO AS AMICUS CURIAE

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CASE NO. 80-1188

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES EDGAR,

Appellant,

v.

MITE CORPORATION, and
MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATE OF OHIO AS AMICUS CURIAE

INTEREST OF THE STATE OF OHIO

The State of Ohio, by and through the Commissioner of the Ohio Division of Securities, is statutorily charged with the responsibility for the regulation and enforcement of the Ohio Securities Act, including the provisions of the Ohio Takeover Statute (the "Ohio Act"), Section 1707.041 of the Ohio Revised Code. As the second state to enact a statute regulating corporate acquisitions by tender offer, Ohio extends protection to investors by requiring that shareholders confronted by a tender offer be provided with fair, full and effective disclosure of all information material to a decision to accept or reject the offer.

This case concerns the validity of the Illinois Business Take-Over Act, Ill. Rev. Stat. ch. 121 ½ section 137.51 et seq. (1979) (the "Illinois Act"), and its application to a proposed corporate acquisition by tender offer. This transaction was subject also to the provisions of the Williams Act amendments to the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. 78m(d)-78m(e), 78n(d)-78n(f), the parallel federal regulation governing tender offers. The United States Court of Appeals for the Seventh Circuit concluded that the Illinois Act is preempted by the Williams Act; the Illinois Act burdens interstate commerce; and therefore, the Illinois Act is unconstitutional. The Seventh Circuit did not believe, however, that all state legislation in this field was unconstitutional, nor did it see any reason that the Williams Act could not be validly complemented and investor protection furthered by state takeover statutes.[1]

The resolution of the complex constitutional issues presented by this case may have a substantial impact upon the continued protection of investors through the operation of the analogous Ohio Takeover Act and its administration by the the Commissioner of the Ohio Division of Securities. The State of Ohio respectfully submits this brief in support of (a) the constitutionality of the Illinois Act, and (b) the conclusion shared by the Seventh Circuit that not all state regulation of tender offers is unconstitutional *per se*. The brief includes an analysis of the practical effect of the Ohio Act as it has been interpreted and applied, to demonstrate that state statutes serve to complement and effectuate the investor protection purpose of the Williams Act without placing excessive burdens upon interstate commerce.[2]

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1. *Mite Corporation v. Dixon*, 633 F.2d 486, 502-3 (7th Cir. 1980).

2. *See, AMCA International Corporation v. Krouse*, 482 F. Supp. 929 (S.D. Ohio 1979).

SUMMARY OF ARGUMENT

I

State takeover statutes and their federal counterpart, the Williams Act, share identical purposes in the regulation of tender offers – the protection of investors. Each regulatory scheme effectuates its purpose through mechanisms which are designed to provide disclosures to shareholders of target corporations, upon which the shareholders may then make informed investment decisions. While the statutory schemes are not procedurally identical, the state statutes complement and are consistent with the Williams Act, rather than being in conflict.

Congress has not expressly preempted state regulation of tender offers in either the Securities Exchange Act of 1934 or the Williams Act amendments thereto. On the contrary, Section 28(a) of the 1934 Act specifically preserves state laws insofar as those laws do not conflict with the provisions of the 1934 Act.[3] Furthermore, there is no exclusive federal occupation of the field of securities regulation from which congressional preemption of state takeover statutes can be inferred.

Rather, this is a case like *New York Dept. of Social Services v. Dublino,* 413 U.S. 405, 421 (1973), in which

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3. As noted by the Seventh Circuit, 633 F.2d at 499, n.25, the Securities and Exchange Commission promulgated Rule 14d-2(b), 17 C.F.R. 240. 14d-2, effective January 7, 1980. If valid, the effect of Rule 14d-2(b) would be to preempt the precommencement public announcement provisions of virtually all of the thirty-seven (37) state takeover statutes presently in existence. The validity of this Rule and its effect upon the Ohio Takeover Act is currently *sub judice, Canadian Pacific Enterprises (U.S.) Inc. v. Kenneth E. Krouse* (No. 81-3083, 6th Cir., *appeal pending*). Rule 14d-2(b) did not apply to the controversy before the Seventh Circuit and that court did not consider its effect upon the Illinois Act. Accordingly, this brief will not address the validity or effect of Rule 14d-2(b), but will consider the merits and facts of the controversy as determined by the Seventh Circuit.

this Court declined to preempt state law "[w]here coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes. . . ." Existing within this complementary framework, state takeover statutes such as that of Illinois do not stand as an obstacle to the accomplishment and execution of the purposes and objectives of the Williams Act, *Hines v. Davidowitz*, 312 U.S. 52, 67(1941), and are therefore constitutional.

II

State takeover statutes recognize that tender offers are unique transactions which combine elements of corporate transactions traditionally regulated by the states, and elements of securities transactions traditionally subject to cooperative federal-state regulation. A tender offer represents a change in and acquisition of corporate control, a process which the states have a legitimate interest in regulating for the purpose of protecting the investor/shareholder, as with similar internal affairs transactions of corporations.

These state statutes further other legitimate state interests which, when balanced against alleged burdens resulting from compliance therewith reveal that no impermissible burden upon interstate commerce exists. So too, this balancing process affirmatively demonstrates that any burden upon interstate commerce attributable to state takeover statutes is not "clearly excessive" in relation to their identifiable and substantial legitimate state interests.

ARGUMENT

I

PROTECTION OF INVESTORS, THE SOLE PURPOSE OF THE WILLIAMS ACT, IS CONSTITUTIONALLY COMPLEMENTED AND FURTHERED BY STATE TAKEOVER STATUTES.

The United States Court of Appeals for the Seventh Circuit determined that Congress did not expressly preempt state regulation of tender offers in either the Securities and Exchange Act of 1934 or the Williams Act amendments thereto and affirmatively concluded that such federal legislation did not "bar the states from regulating tender offers." 633 F.2d 486 at 491. Similarly, in response to the argument that preemption of state regulation in this area may be inferred, the Court stated that:

> Nor is the federal scheme of regulating tender offers so pervasive that an implicit congressional intent to preempt parallel state legislation may fairly be inferred. *Id.* at 491.

Rather, the Seventh Circuit found "the absence of an exclusive federal interest in the field of securities regulation [to be] persuasively demonstrated by the historically coordinate role of state regulation in the field." *Id.* The Court of Appeals, however, in applying the "conflict" test of *Hines v. Davidowitz*, 312 U.S. 52 (1941), coupled with the rationale of *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (1978), *rev'd on venue grounds sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979), did conclude that the Illinois Act is preempted by the Williams Act. 633 F.2d at 498.

Inquiry into the existence of "conflict" under the *Hines* test requires that a court "consider the relationship between state and federal laws *as they are interpreted and applied, not merely as they are written.*" (Emphasis added). *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). Yet the Seventh Circuit, by its own admission was unable to do so, for:

> . . . any conslusion as to the actual effect it [Illinois Act] has had, or may have, on tender offers in Illinois would be purely speculative because the record is devoid of evidence on that subject. 633 F.2d at 497.

Thus, the Illinois Act which was neither applied to nor operative in the Mite-Chicago Rivet tender offer; of which no prior history or experience was contained in the evidentiary record; and, as to which conclusions based upon speculation were made, was found to somehow be an obstacle to the accomplishment and execution of the purposes of the Williams Act.

By way of contrast, the Ohio Act, after ten years of existence; actual application to sixteen (16) tender offers; and, three days of trial in federal district court based upon its history and application, was held not to have been preempted by the Williams Act. *AMCA International Corp. v. Krouse*, 482 F.Supp. at 938 (1979) (hereinafter referred to as *"AMCA"*). While the Ohio and Illinois Acts are parallel rather than identical, they share a mutuality of purpose which when examined (as in *AMCA*), reveal that state takeover statutes effectively complement the Williams Act, benefit shareholders and protect investors.[4] The unique and extensive

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4. This Court in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 35 (1977), after reviewing its legislative history, definitively stated that "the *sole purpose* of the Williams Act was the *protection of investors* who are confronted with a tender offer." (Emphasis added). Illinois and Ohio share this identity of purpose in their respective takeover statutes.

application and history of the Ohio Act, together with the analysis thereof by the *AMCA* court, demonstrate the shortcomings of the Seventh Circuit's corresponding analysis of the Illinois Act.

Ohio has been the most active state to date in terms of filings and proceedings under its takeover statute, to determine whether "the offeror proposes to make fair, full and effective disclosure to offerees of all information material to a decision to accept or reject the offer." R.C. 1707.041(B)(1)(c).[5] This dominant theme of investor protection through disclosure mirrors the efficacy and desirability of disclosure as revealed by the legislative history of the Williams Act [H.R. Rep. No. 1711, 90th Cong., 2d Sess. 2813 (1968)], and reaffirmed by this Court in *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975). The possibility that disclosure to shareholders/investors would deter the making of a tender offer was considered and dismissed during deliberations upon the Williams Act [H.R. Rep. No. 1711 at 2813-14], and is belied by the experience in Ohio which has demonstrated "that tender offers have [not] been unduly inhibited by the Ohio Act." *AMCA* at 938.

The Williams Act was characterized by the Seventh Circuit as "essentially a minimum disclosure statute." 633 F.2d at 491. The Ohio Act adds flesh to this federal skeleton of investor protection through disclosure, so as to differ therefrom primarily in that it:

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5. Disclosure to offeree/shareholders was also the means selected in the Williams Act for protection of investors, as evidenced by the following statement by the Act's sponsor, Senator Williams:

> This legislation will close a significant gap in *investor protection* under the Federal securities laws by requiring the *disclosure* of pertinent information *to stockholders* when persons *seek to obtain control of a corporation* by a cash tender offer or through open market or privately negotiated purchases of securities. 113 Cong. Rec. 854 (Emphasis added.)

> . . . requires fuller disclosure, imposes administrative review, extends the period of public scrutiny and requires that the tender offer be made on the same terms to Ohio shareholders as to others. *AMCA* at 936.[6]

"Fuller disclosure" provides information material to the shareholder's decision, so that acceptance or rejection of the offer may then be made intelligently upon evaluation of these disclosures by the shareholder.[7] This is especially relevant to the shareholder who may wish to remain a shareholder rather than tender, or in the event that a tender offer is made for less than all of the outstanding securities of a corporation.

Disclosure to investor/shareholders is also a product of the "administrative review" procedures undertaken by the Ohio Division of Securities (the "Division") if hearings are conducted in accordance with the Act. R.C. 1707.041(B)(1). Administrative hearings are held to test

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6. The operative language of the Ohio Statute requires and provides, *inter alia:* (i) 20 days prior to a takeover bid, the offeror must publicly announce the terms of the offer; (ii) at the same time, file with the Division of Securities and the target company copies of information required by R.C. section 1707.041(B)(3); (iii) administrative hearing to review the offer when ordered by the Division or requested by the target and the Division so orders, either of which must occur within 10 days of the filing; (iv) if a hearing is ordered it must be held within 40 days of the date of the filing; (v) adjudications made pursuant to hearing must be made within 60 days of the date of filing; and, (vi) if no hearing is ordered, the offeror may proceed at the end of the 20-day period from the date of the initial filing.

7. *E.g.,* R.C. 1707.041(B)(3)(g) and (h) require an offeror to disclose its capitalization, financial statements, pending non-routine litigation, etc. .... *AMCA* at 936. Disclosures in the Occidental Petroleum tender offer for Mead Corporation included, as a result of proceedings in Ohio, potential problems of Occidental (offeror) with its Hooker Chemical subsidiary and with the Libyan government.

the adequacy of the disclosure materials proposed to be disseminated to shareholders, with ultimate discretion resting with the Division as to convening a hearing.[8] Adjudications made pursuant to the hearing process, again, have focused upon the adequacy of the offeror's disclosures, to determine whether they are fair, full and effective.[9]

Moreover, the practical effect of evaluation of the disclosures under the Ohio Act has been to create sufficient time within which a shareholder may assess the offering documents in order to reach an informed investment decision. This "delay" prevents a "knee-jerk" response by a shareholder to an offer that is made at a premium over the then-prevailing market price of the target company's stock, without having had an opportunity to digest and evaluate complex disclosure materials provided pursuant to federal and state law. State takeover statutes establish a readily ascertainable time schedule within which the investor, the investment community and the stock markets may adjust to and react to the volitility caused by a theretofore unannounced tender offer.

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8. A target company may not automatically convene a hearing before the Division upon its request. The Division is the ultimate arbiter in this regard and has refused to convene hearings even though requested to do so. *AMCA* at 494. *Compare,* Ill. Rev. Stat. ch. 121 ½, Section 137.57.A.

9. Similar to Ill. Rev. Stat. ch. 121 ½ Section 137.57.E, the Ohio Act provides for a "fairness" review of a tender offer by the Division. R.C. 1707.041(B)(4). No such review of the fairness of a tender offer has ever been undertaken or made under the Ohio Act, nor has the Division ever ordered that an offeror could not proceed wth its offer. The hearing process *has* resulted in additional disclosures to shareholders and the process and adjudication have *always* been completed within the prescribed statutory time of sixty (60) days from date of filing.

The natural result of this process has been the creation of a bidding market in the shares of the target company's stock, as the market is thus able to assess the disclosures of the offer and their adequacy and thereby respond in a responsible fashion. The benefits which inure to the investor/shareholder therefrom have been numerous. The investor who desires to make an immediate liquidation has a market during the offering period (at or near the tender offer price), as neither state nor federal law preclude the ability to sell on the open market. Or, the investor may wait until the best price is developed in the marketplace as the result of a competing tender offer. This latter phenomena would oftentimes not occur, but for the existence of state takeover statutes.[10] The evolvement of this market and its attendant inarguable benefits to shareholders serve to best-exemplify the investor protection philosophy and reality embodied by state takeover statutes.

The record in *AMCA* of the history and application of the Ohio Act conclusively establishes that Ohio has mirrored the disclosure policy of the Williams Act, yet has supplemented and complemented the minimum federal requirements to successfully achieve investor protection. The application and interpretation of the Ohio Act simply belies the pejorative label attached to state takeover statutes, that they have adopted a "fiduciary" rather than a "market" approach to

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10. This increase in the price paid is most dramatically demonstrated by the market created during the tender offer of AMCA International Corporation for Warner & Swasey. Because of the "braking effect" which the Ohio Act had upon AMCA's actions, Bendix Corporation, a competing offeror, was able to enter the contest. AMCA's original offer was at $57.00 per share at a time when Warner & Swasey's stock was valued in the market at about $36.00 per share. When Bendix ultimately acquired Warner & Swasey, the price paid per share was $83.00, after AMCA had increased its offer to $75.00 per share in response to Bendix's initial competing offer of $70.00 per share. This represented an aggregate increase of more than $90 million to Warner & Swasey shareholders.

regulation of tender offers.[11] The ultimate arbiters of every tender offer subject to the Ohio Act and the jurisdiction of the Division have been the investor/shareholders. *AMCA* at 938. The Ohio Act was designed to and has in fact protected these beneficiaries of the statute by providing a reasonable period of time within which to reach an informed investment decision and to assess the reaction of the market to the offer.

The relationship of the Williams Act and parallel state regulation, as interpreted and applied to the experience and history of the Ohio Act by the court in *AMCA International Corp. v. Krouse,* 482 F.Supp. 929 (S.D. Ohio 1979), affirmatively supports the Seventh Circuit's belief that it is "possible to draft state takeover legislation to supplement (rather than to contradict) the Williams Act and the congressional *premises and purposes which it incorporates.*" 633 F.2d at 503. The Ohio Act further offers empirical evidence for the Seventh Circuit's perception that "the Williams Act may ... be validly complemented and investor protection furthered by state legislation." *Id.*

11. The lable that the Illinois Act adopts a "fiduciary approach" is similarly unfounded, as the record below does not examine the application or interpretation of that Act, but simply reviews the facial wording of the Act. 633 F.2d at 497.

II

THE REGULATION OF INTERNAL CORPORATE AFFAIRS BY STATE TAKEOVER STATUTES TO EFFECTUATE INVESTOR PROTECTION DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Seventh Circuit, utilizing the balancing test formulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), also concluded that the Illinois Act violates the Commerce Clause of the United States Constitution. It did so, despite the absence of an evidentiary record against which the actual operation of the Illinois Act could be compared. While the Court's analysis refers to "potentially weighty" burdens; "significant potential" of the Act to cause commercial disruption; and "no evidence in the record as to what the actual effect of the Act" has been in preventing the removal of local business from Illinois; the Court is nevertheless firm in its conviction that "the Illinois Act burdens interstate commerce in a manner which is *substantial, clear* and *present* . . . ." 633 F.2d 502-503 (Emphasis added).

The Illinois Act is, *inter alia*, a state statute designed to regulate the internal affairs of a corporation which has a sufficient nexus to the State of Illinois.[12] Although the statute serves other legitimate local interests, the Act seeks to regulate significant corporate changes which inexorably result from a successful tender offer. As corporations are creatures of state law, the states have traditionally regulated significant structural changes

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12. This nexus is met if a corporation, *inter alia*, meets any two of the following conditions: (a) principal executive office in Illinois; (b) organized under the laws of Illinois; (c) at least 10% of its stated capital and paid-in surplus represented in Illinois. Ill. Rev. Stat. ch. 121 ½, Section 137.52-10.

which occur when control of the corporation shifts.[13] The legislative history of the Williams Act also recognizes that tender offers are unique transactions, unlike any other transfer of securities.[14]

Once again, the analysis by the *AMCA* court of the detailed evidentiary record of the history and application of the Ohio Act is helpful for purposes of a commerce clause analysis.[15] The Court found the Ohio Act to regulate evenhandedly the conduct of offerors. 428 F.Supp. at 938. More importantly, however, the Court believed, upon the facts before it, that Ohio had "abundant legitimate public interest" regulating a proposed tender offer for Warner & Swasey. *Id.* at 939.[16] This interest was premised upon the court's recognition that:

> Tender offers profoundly affect corporate internal affairs and fiduciary relationships traditionally within the purview of state regulation ... tender offers are to be considered functionally as internal affairs transactions, comparable to proxy contests and mergers, in which a state possesses a compelling interest: investor protection. *Id.*

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13. *Cort v. Ash*, 422 U.S. 66, 84 (1975). In addition to *Cort v. Ash*, this Court's decision in *Santa Fe Industries v. Green*, 430 U.S. 462 (1977) dispels any notion of a dominant federal interest in the regulation of corporations. Taken together, these decisions emphasize the cooperative nature of federal-state regulation of securities transactions generally, and primary deference to state law regulating the internal affairs of a corporation specifically.

14. Senate Comm. on Banking and Currency, *Full Disclosure of Corporate Equity Ownership in Corporate Takeover Bids*, S. Rep. No. 550, 90th Cong., 1st Sess. 2-4 (1967).

15. The jurisdictional nexus of the Ohio Act requires that a corporation be organized under the laws of Ohio or have its principal place of business and substantial assets within Ohio. R.C. 1707.041(A)(1).

16. Warner & Swasey was an Ohio corporation with its principal place of business in the State, as well as the main part of its assets and approxiately one-third of its shareholders in Ohio. *Id.*

See, Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 Case W. Res. L. Rev. 722, 741-45 (1970).

The fact that a statute may have effect beyond the boundaries of the state does not make such statute invalid under the Commerce Clause. The allegation of "extraterritoriality" is particularly anomalous when state corporation law, by its very nature, extends beyond the boundaries of the regulating state. Accordingly:

> ... it is a curious suggestion that extraterritorial protection of shareholders is illicit in the context of state tender offer statutes, but expected in the context of state corporation laws. Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western,* 53 N.Y.U. L.R. 872, 922 (1978).

Therefore, any extraterritorial effect of state takeover statutes must first be shown to be a burden and then weighed against the legitimate state interests fostered by the statute before it can be concluded that the alleged burden on interstate commerce is "clearly excessive" in relation to the statute's benefits.

The case at bar illustrates the compelling interest of the State of Illinois in protecting investors by the Illinois Act's regulation of the proposed change in control of Chicago Rivet to Mite Corporation. Chicago Rivet is organized under the laws of the State of Illinois and has its principal executive office in Illinois. Additionally, the Seventh Circuit determined that approximately 27% of Chicago Rivet's shareholders were Illinois residents, which represented approximately 43% of the outstanding shares. 633 F.2d at 501. Thus, as the controlling forum of the internal affairs of an Illinois corporation, the

legitimate interests of the State of Illinois in exercising regulatory authority in a tender offer for Chicago Rivet cannot be gainsaid.[17]

In light of these legitimate state interests and without the benefit of a record evidencing the application of the Illinois Act, it is unlcear how the Illinois Act was found to impose upon interstate commerce a burden that is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc., supra* at 142. Any perceived or alleged burden is not demonstrated by the record, but rather exists in theory and speculation.[18] By contrast, the examination of the Ohio Act in *AMCA* illustrates the exacting scrutiny of the actual application of a state statute under the *Pike* balancing test and commerce clause analysis. Having done so, the court found "the Ohio Act, like any regulation, affects commerce and imposes costs upon regulated parties." 482 F.Supp. 941. Yet having *reviewed the record,* the court concluded that the Ohio Act did not impose an impermissible burden upon interstate commerce. *Id.*

When appropriately viewed as the regulation of internal corporate affairs to effectuate investor protection, state takeover statutes exist well within the bounds of any commerce clause guidelines. Such legitimate, even compelling, local interests of the states

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17. The Seventh Circuit clearly recognized that "[p]rotecting resident investors is indisputably a legitimate state objective." *Id.* at 500. The Court, however, absent an evidentiary record, concluded that "the benefits flowing to Illinois shareholders from the Act are, to a significant degree, speculative." *Id.*

18. For example, the history of tender offers to date does not support the Seventh Circuit's fear that a multitude of states will impose conflicting regulations on an offeror through their respective tender offer statutes. 633 F.2d at 502. To the contrary, the tender offer of United Technologies for Babcock and Wilcox exemplifies state cooperation, whereby the New Jersey authorities relied upon testimony produced in Ohio hearings for review under the New Jersey takeover statute. In the case at issue, while it was alleged that two states could have asserted jurisdiction, in fact, only Illinois did.

do not burden commerce in relation to the putative local benefits. Rather, they preserve recognized fiduciary relationships between shareholders and corporate management. When afforded their appropriate deference in the balancing test, such state interests clearly outweigh any potential burdens which result from compliance with state takeover statutes.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES EDGAR, APPELLANT

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MITE CORPORATION AND MITE HOLDINGS, INC.

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QUESTION PRESENTED

Whether the Illinois Business Take-Over Act is unconstitutional under the Supremacy and Commerce Clauses of the United States Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1188

JAMES EDGAR, APPELLANT

v.

MITE CORPORATION AND MITE HOLDINGS, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission ("Commission") is responsible for the administration and enforcement of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78a *et seq.*, of which the Williams Act is a significant part.[1] As the agency principally responsible for the achievement of the objectives of the Williams Act, the Commission has a substantial interest in the application of any potentially conflicting state scheme for the regulation of tender offers, and it also has a substantial interest in the question whether particular state securities laws with extraterritorial effects impose undue burdens on interstate commerce.

[1] The Williams Act added new Sections 13(d), 13(e), 14(d), 14(e) and 14(f) to the Securities Exchange Act of 1934. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454 *et seq.* (codified at 15 U.S.C. 78m(d)-(e) and 78n(d)-(f)).

STATEMENT

This is an action seeking injunctive relief and a declaration that the Illinois Business Take-Over Act (Ill. Ann. Stat. ch. 121½, § 137.51 *et seq.* (Smith-Hurd Cum. Supp. 1980)) is unconstitutional under the Supremacy and Commerce Clauses of the United States Constitution. Appellees MITE Corporation and MITE Holdings, Inc. ("MITE") filed this action in the United States District Court for the Northern District of Illinois against the Secretary of State of Illinois, who is charged with the administration and enforcement of the Illinois statute. MITE filed its complaint on the same day that it commenced a cash tender offer for the shares of Chicago Rivet and Machine Company ("Chicago Rivet") by complying with Section 14(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(d).[2]

The Illinois statute imposed preconditions, beyond those prescribed in the federal securities laws, to the commencement of MITE's tender offer. These included the filing of a notice of the proposed tender offer with state officials, completion of a 20-day waiting period, and—if the Illinois Secretary of State so ordered—an adjudication of the substantive fairness of MITE's offer. MITE declined to comply with these requirements and sought, in addition to declaratory relief, an injunction prohibiting the enforcement of the Illinois statute in connection with its tender offer.[3] The district court entered a preliminary injunction enjoining the Secretary of State from issuing a cease and desist order or notice of hearing

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[2] MITE Corp. and MITE Holdings are Delaware corporations with principal executive offices in Connecticut (J.S. App. 2a). Chicago Rivet is an Illinois corporation whose shares are traded on the American Stock Exchange (*ibid.*).

[3] The Illinois Secretary of State previously had notified MITE of his intention to serve an order requiring MITE to "cease and desist all further action to make a tender offer to security holders of the Chicago Rivet & Machine Co." (J.S. App. 36a).

under the Illinois statute, or from otherwise enforcing the statute against MITE (J.S. App. 36a).

In accordance with federal law, MITE then commenced its tender offer and published notice thereof in the national edition of the Wall Street Journal. The tender offer represented a proposed transaction in interstate commerce in excess of $23 million, and extended to all shareholders of Chicago Rivet residing throughout the United States (J.S. App. 5a). The tender offer price per share was $28, which represented a premium of more than $4 per share over the market price in the period immediately preceding the announcement of the offer (*id.* at 33a-34a).

Following a hearing on MITE's motion for a permanent injunction, the district court entered a final judgment in favor of MITE (J.S. App. 32a-41a). The court declared the Illinois statute to be both preempted by the Williams Act and an undue burden on interstate commerce. The district court therefore permanently enjoined enforcement of the Illinois statute against MITE (*id.* at 41a).

The court of appeals affirmed (J.S. App. 1a-31a). The court of appeals agreed with the district court that several provisions of the Illinois statute frustrate the congressional purposes underlying the Williams Act and therefore are preempted (*id.* at 6a-23a). The court also found that the Illinois statute substantially obstructs interstate commerce without being necessary to the achievement of any significant local objective, in contravention of the Commerce Clause (*id.* at 24a-30a).

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Congress enacted the Williams Act amendments to the Securities Exchange Act in response to the increasing use of cash tender offers for corporate acquisitions. See generally *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 22-23 (1977). Section 14(d) of the Act, 15 U.S.C. 78n(d), requires disclosure of material information at

the time a tender offer is first made and also embodies certain substantive protections, including those establishing withdrawal rights, requiring pro rata acceptance of tendered shares in an oversubscribed partial offer, and mandating equal consideration for tendering shareholders. See J.S. App. 11a.

Pursuant to its rulemaking authority, the Commission has promulgated detailed rules governing the conduct of tender offers. See Securities Exchange Act Release No. 16384, 44 Fed. Reg. 70326 (1979). Together, the Williams Act and the Commission's rules provide a comprehensive framework for the protection of security holders confronted with a tender offer.

2. A state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" embodied in federal law must yield, under the Supremacy Clause, to the federal legislation. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). In enacting and subsequently amending the Williams Act, and in enacting the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. 18a, Congress sought to protect investors confronted with a tender offer through a "policy of neutrality in contests for control." *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 29. The Illinois statute stands as an obstacle to the achievement of Congress' goal of neutrality because the statute's provisions requiring mandatory hearings, substantive fairness review, and pre-commencement notification tip the balance of advantage in favor of the subject company's incumbent management. Moreover, the statute's substantive fairness review and advance disclosure provisions contravene congressional policy against such provisions as exemplified by Congress' adoption of a "free market" approach to tender offer regulation and its repeated and deliberate refusal to require advance disclosure under federal law. The Illinois statute therefore is invalid under the Supremacy Clause.

3. The Illinois statute represents an attempt by the state to exercise extraterritorial jurisdiction. Because

the Commerce Clause prohibits a state from directly regulating commerce in other states (*Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 199 (1925)), the Illinois statute is invalid. Moreover, even when a state statute regulates interstate commerce only indirectly or in its local aspects, the burden imposed on that commerce must not be excessive in relation to the local interests furthered by the statute. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Because the Illinois statute substantially obstructs interstate commerce without significantly promoting local interests, it fails to satisfy the requirements of the Commerce Clause.[4]

ARGUMENT

I. THE WILLIAMS ACT PREEMPTS THE ILLINOIS BUSINESS TAKE-OVER ACT

The issue before this Court is whether the Illinois take-over statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz, supra*, 312 U.S. at 67. See also *Maryland* v. *Louisiana*, No. 83 Orig. (May 26, 1981), slip op. 20; *Chicago & Northwestern Transp. Co.* v. *Kalo Brick & Tile*, No. 79-1336 (Mar. 9, 1981), slip op. 5-6.[5] This inquiry requires a "careful comparison of

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[4] The Supremacy and Commerce Clause issues discussed in this brief are treated at greater length at pages 15-62 of the Commission's brief amicus curiae in *Leroy* v. *Great Western United Corp.*, No. 78-759 (referred to hereinafter as "*Leroy* Amicus Br.").

[5] A preemptive conflict also will be found when "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963). Although we do not contend that the Illinois statute stands in direct operational conflict with the Williams Act, the Illinois statute does conflict with a recently promulgated Commission rule.

Pursuant to its rulemaking authority under the Securities Exchange Act and the Williams Act, the Commission has promulgated detailed rules governing the conduct of tender offers. See Securities Exchange Act Release No. 16384, 44 Fed. Reg. 70326 (1979). Rule 14d-2(b), 17 C.F.R. 240.14d-2(b), requires that a tender

the terms of the Williams Act" with those of the Illinois statute (J.S. App. 9a).[6]

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offeror, within five days of making a public announcement of the material terms of the offer, either make its offer effective by disseminating specified information to security holders and filing the requisite documents with the Commission or announce that it is withdrawing its offer. Rule 14d-2(b) stands in direct operational conflict with the advance disclosure provisions of state takeover laws. Such state law provisions forbid precisely what the federal rule requires—the prompt commencement of the tender offer once the offeror has publicly disclosed the material terms thereof. See 44 Fed. Reg. 70329-70330 (1979). Accordingly, federal and state courts uniformly have held that Rule 14d-2(b) preempts the pre-commencement filing requirements of state takeover statutes. The cases are collected at page 6 n.6 of our brief *amicus curiae* at the jurisdictional stage. See also *id.* at 4-5.

Because the events at issue in this litigation occurred before the effective date of Rule 14d-2(b), and the new rules expressly provide that their application will be prospective only, the court of appeals did not base its decision on the new rule, although it correctly observed that Rule 14d-2(b) would "directly conflict" with the pre-commencement disclosure provisions of the Illinois statute (J.S. App. 23a n.25).

[6] See *Perez* v. *Campbell*, 402 U.S. 637, 644 (1971). In addition to the proscriptions embodied in the Supremacy Clause, Congress expressly has forbidden attempts by the states to regulate securities transactions in a manner that would undermine or conflict with the operation of federal law. Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78bb(a), bars any state from enacting a law that conflicts with either the Securities Exchange Act or any rules or regulations promulgated thereunder. Section 28(a) provides in pertinent part (emphasis added):

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person *insofar as it does not conflict with* the provisions of this chapter or the rules and regulations thereunder.

Section 28(a) "was designed to save state blue-sky laws from preemption." *Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 182 n.13 (1979). Its terms establish, however, that when state law conflicts with the federal securities laws, the state law must yield, since "Section 28 essentially restates the supremacy clause, making it a statutory as well as a constitutional requirement." *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1271 (5th

Achievement of the goals of a federal statute often depends on adherence to deliberately selected limitations on the scope of regulation. The congressional plan may include an important role for unfettered private decision-making. In such cases, preservation of the line between what the law regulates and what it leaves alone may be essential to the success of the statutory strategy. This is especially clear when, as here, the legislative history of a federal statute shows that Congress intended to strike a balance between the interests of affected persons and rejected more far-reaching regulatory requirements or constraints. A state law that disturbs the congressionally-selected balance among interested persons by imposing more extensive or restrictive regulation obstructs "the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, *supra*, 312 U.S. at 67. See also *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); *Goldstein* v. *California*, 412 U.S. 546, 569-570 (1973); *New York Central R.R.* v. *Winfield*, 244 U.S. 147, 153-154 (1917).

As we demonstrate below, the Illinois statute clashes with Congress' fundamental objectives in enacting the Williams Act. In particular, the Illinois statute (a) provides for hearings of potentially unlimited duration, which incumbent management often may initiate, whereas Congress has determined that delay in commencing tender offers causes serious harm to shareholders; (b) empowers a state official to pass upon the substantive fairness of a tender offer and to block it altogether on the theory that it is "inequitable," whereas Congress has mandated individual decision-making by shareholders possessing material facts about the transaction; and (c) imposes a lengthy pre-commencement notification requirement on tender offerors, whereas Congress repeatedly has rejected such a requirement.

Cir. 1978), rev'd on venue grounds *sub nom. Leroy* v. *Great Western United Corp.*, *supra*. Section 28(a) is discussed at greater length at *Leroy* Amicus Br. 18-19 & n.15, 38-39 & n.38, and in *Great Western United Corp.* v. *Kidwell*, *supra*, 577 F.2d at 1275-1276 & n.39.

A. The Illinois Statute Unduly Delays Tender Offers Through Mandatory Hearings

In enacting the Williams Act amendments, Congress sought to ensure that "public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party." *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975) (footnote omitted); see S. Rep. No. 550, 90th Cong., 1st Sess. 2 (1967) ("Senate Report"). At the same time, however, Congress recognized that "takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management." *Id.* at 3; see also 113 Cong. Rec. 24665 (1967) (colloquy between Senator Javits and Senator Williams).

In order to achieve its goal of protecting shareholders without depriving them of the opportunity to benefit from tender offers, Congress struck a balance that constitutes a federal "policy of neutrality in contests for control." *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 29. The drafters of the Williams Act emphasized that they had taken "extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid" and that the bill was "designed to require full and fair disclosure for the benefit of investors while at the same time providing the offerer and management equal opportunity to fairly present their case." Senate Report at 3; H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968) ("House Report"); see *Rondeau* v. *Mosinee Paper Corp.*, *supra*, 422 U.S. at 58-59. Indeed, as this Court noted in *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 29-30, the essential relationship between Congress' policy of neutrality and its purpose to protect investors is underscored by the fact that statements concerning the need for neutrality are contained in the sections of the House and Senate Reports entitled "Protection of Investors." See Senate Report at 3; House Report at 4. Congress recently reaffirmed its view that the "basic pur-

pose" of the Williams Act is to ensure neutrality between offerors and subject companies when it enacted the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. 18a.[7]

An effective method for upsetting this regulatory balance, and one that the Illinois statute adopts, is to interject extended delay in the tender offer process. The Illinois statute empowers the Secretary of State to call a hearing concerning any tender offer subject to that law. Ill. Ann. Stat. ch. 121½, § 137.57.A (Smith-Hurd Cum. Supp. 1980). The offer may not proceed until the hearing is completed. *Id.* at § 137.57.B. The Secretary may call a hearing at any time during the waiting period prior to the effective date of the offer (*id.* at § 137.57.A), and the statute provides no deadline for completion of the adjudicatory proceeding. *Id.* at § 137.57.C-D. Finally, once the hearing has been concluded, the Secretary is accorded 15 business days to render a decision. *Id.* at § 137.57.D. But that period may be extended without limitation. *Ibid.* Thus, the Illinois statute provides for hearings of potentially unlimited duration, which must be completed before the tender offer may commence.

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[7] See pages 10-11, *infra*. Appellant argues (Br. 16-17) that, since investor protection rather than neutrality is the basic objective of the Williams Act, the fact that the Illinois statute alters the balance between incumbent management and the offeror does not thwart any congressional purpose. However, as noted above, Congress believed that a policy of strict neutrality is essential for the protection of investors. Moreover, appellant relies (Br. 16) on a misconstruction of this Court's statement in *Piper* v. *Chris-Craft Industries, Inc., supra*, 430 U.S. at 29, that neutrality "does not go * * * to the purpose of the legislation." In *Piper*, this Court was faced only with the question whether Congress' objectives in enacting the Williams Act permitted the Court to "read into" the Act a private right of action for unsuccessful offerors (*id.* at 24). The Court simply found that the "congressional policy of 'evenhandedness' is nonprobative of the quite disparate proposition that the Williams Act was intended to confer rights for money damages upon an injured takeover bidder" (*id.* at 31). This case presents the unrelated question whether a state law that undermines that "congressional policy of 'evenhandedness' " impermissibly obstructs the federal scheme.

The hearing provisions of the Illinois statute also potentially accord incumbent management "a powerful weapon to stymie indefinitely a takeover" (J.S. App. 13a). The Secretary is required to call a hearing if requested to do so by, among other persons, Illinois residents holding 10% of the subject company's shares. Ill. Ann. Stat. ch. 121½, § 137.57.A (Smith-Hurd Cum-Supp. 1980). Since incumbent management in many cases will control, either directly or indirectly, the requisite number of shares (see J.S. App. 14a), this provision effectively empowers management to initiate protracted hearings.

As the Fifth Circuit noted in *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1278 & n. 49 (1978): "Most observers of takeover battles agree that time is among the most effective weapons available to a company resisting a tender offer." [8] When it enacted the Williams Act, "Congress recognized that delay can seriously impede a tender offer" (*id.* at 1277; see Senate Report at 4), and it re-emphasized that same judgment when it enacted the Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383, 15 U.S.C. 12 *et seq.* For example, the House Report on that legislation stated:

> [I]t is clear that this short waiting period [the ten-day period for proration provided by Section 14(d)(6) of the Securities Exchange Act] was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders. This ten-day waiting period thus underscores the basic purpose of the Williams Act—to maintain a neutral policy towards

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[8] Among other things, delay enables a subject company to: (1) repurchase its own securities; (2) announce dividend increases or stock splits; (3) issue additional shares of stock; (4) acquire other companies to produce an antitrust violation should the tender offer succeed; (5) arrange a defensive merger; (6) enter into restrictive loan agreements; and (7) institute litigation challenging the tender offer. See, *e.g.*, E. Aranow & H. Einhorn, *Tender Offers for Corporate Control* 242-249, 254-258, 266-268, 274-276 (1973).

> cash tender offers, by avoiding lengthy delays that might discourage their chances for success.[9]

Representative Rodino, in explaining the relationship between the Hart-Scott-Rodino Act and the Williams Act, emphasized the negative consequences for shareholders of lengthy delays in the tender offer process.[10]

The congressional judgment therefore is clear—extended delay in tender offers unduly favors subject company management at the expense of shareholders. In sharp contrast, the hearing provisions of the Illinois statute facilitate substantial delay, and incumbent management can itself bring about that delay. The statute thus "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines* v. *Davidowitz*, *supra*, 312 U.S. at 67), and therefore must yield to federal law. *Great Western United Corp.* v. *Kidwell*, *supra*, 577 F.2d at 1277-1280.

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[9] H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976). See also note 19, *infra*.

[10] See 122 Cong. Rec. 30877 (1976):

> In the case of cash tender offers, more so than in other mergers, the equities include time and the danger of undue delay. This bill in no way intends to repeal or reverse the congressional purpose underlying the 1968 Williams Act, or the 1970 amendments to that act. * * * Lengthier delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a State with an antitakeover statute, or negotiating costly lifetime employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tenders give to them: Either accept the offer and thereby gain the tendered premium, or reject the offer. Generally, the courts have construed the Williams Act so as to maintain these two options for the target company's shareholders, and the House conferees contemplate that the courts will continue to do so.

B. The Substantive Fairness Review And Pre-Commencement Notification Provisions Of The Illinois Statute Conflict With The Congressional Design For Tender Offer Regulation

Wholly apart from the question whether Congress in enacting the Williams Act intended to create a regulatory balance between bidder and subject company, the Illinois statute violates the Supremacy Clause by (1) enabling the state administrator to pass on the substantive fairness of the tender offer and (2) requiring pre-commencement notification of the offer's material terms. In both of these respects, the Illinois statute frustrates the congressional design for regulation of tender offers.

1. *Substantive fairness review frustrates the "market approach" adopted by Congress in the Williams Act*

Congressional deliberations in enacting the Williams Act focused primarily on the importance of providing shareholders with information needed to decide whether to tender their shares. See 113 Cong. Rec. 854 (1967); *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 26-31; *Rondeau* v. *Mosinee Paper Corp.*, *supra*, 422 U.S. at 58. Similarly, the hearings on the legislation emphasized the need "to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself." [11] The House and Senate Reports underscore Congress' intention that shareholders, informed through full disclosure by both sides in the contest, be the actual decision-makers in the tender offer process: "This bill is designed to

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[11] *Great Western United Corp.* v. *Kidwell*, *supra*, 577 F.2d at 1276, citing *Takeover Bids: Hearing on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 4, 47-48 (1968) ("*House Hearings*"); *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 17, 19, 25, 182 (1967) ("*Senate Hearings*").

make the relevant facts known so that shareholders have a fair opportunity to make their decision." Senate Report at 3; House Report at 4.

The Illinois statute threatens to undermine Congress' free market approach. Under § 137.57.E of the Illinois statute, the Secretary of State is empowered to pass upon the substantive fairness of a tender offer. He is required to deny registration to any offer, even one at a premium over the current market price, that he deems "inequitable." Thus, the Illinois statute replaces the investor autonomy contemplated by the Williams Act with the judgment of a state official.[12]

This gives rise to a fundamental conflict with the objective of the federal law. Nowhere on the face of the federal statute or in the legislative history is it suggested that anyone other than shareholders are to judge

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[12] Contrary to the suggestion of Amicus North American Securities Administrators Association, Inc. (Br. 11-13), the Commission does not countenance substantive fairness review of tender offers, but merely has recognized that other government bodies may assess the adequacy of disclosure as well as the regulatory implications of proposed business combinations. For example, the Antitrust Division of the Department of Justice reviews proposed acquisitions to ensure compliance with the antitrust laws but, unlike the State of Illinois, is not empowered to pass on whether a particular offer is "inequitable."

Appellant argues (Br. 21-22) that the Illinois statute does not permit the Secretary to adjudicate the substantive fairness of a tender offer. This argument, advanced by appellate counsel without supporting authority, ignores the wording of the statute, which directs the Secretary to deny registration to a tender offer on the basis that it "fails to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, *or that the take-over offer is inequitable* or would work or tend to work a fraud or deceit upon the offerees * * *." Ill. Ann. Stat. ch. 121½, § 137.57.E (Smith-Hurd Cum. Supp. 1980) (emphasis added). The statute thus speaks in the disjunctive, making fraud, deceit, failure to disclose material information, as well as the inequitable character of the offer, separate grounds for denial of registration. Appellant cites no "apparent legislative purpose" (Br. 22 n.8) to support a substitution of the word "and" for "or". Moreover, counsel's unsupported suggestion relates to only one of the infirmities in the Illinois statute discussed in this brief.

the merits of a tender offer.[13] To the contrary, Congress' consistent objective was to provide investors full and fair disclosure to enable them to make informed decisions and thus determine their own economic self-interest. *Great Western United Corp.* v. *Kidwell, supra*, 577 F.2d at 1276-1277. Because the Illinois statute adopts an inconsistent approach, it stands as an obstacle to the accomplishment and execution of this congressional purpose, and therefore is preempted. See *id.* at 1279.

2. Pre-commencement notification violates the well-established congressional policy against advance disclosure of tender offers

In considering various bills, both before and after enacting the Williams Act, Congress focused on the issue of pre-commencement notification. Congress debated and deliberately rejected proposals to require pre-commencement disclosure by tender offerors on six separate occasions, concluding that such disclosure would harm investors and injure the trading markets.

In October 1965, Senator Williams introduced S. 2731, 89th Cong., 2d Sess. (1966), a bill that would have required that a tender offeror notify the subject company and file a public statement with the Commission containing specified information at least 20 days prior to commencing a cash tender offer. The Commission commented on the bill and observed that "the requirement of a 20-day advance notice to the issuer and the Commission is unnecessary for the protection of security holders * * *." 112 Cong. Rec. 19005 (1966).[14]

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[13] When the Williams Act was being considered, the Commission opposed all suggestions that it be granted authority to evaluate the substantive merits of a tender offer. See *Senate Hearings* at 33 (statement of Chairman Cohen).

[14] Chairman Cohen noted that such an advance notice requirement would give incumbent management "a period in which to mobilize its resources and take action against the offer, at a time when the offeror could not solicit tenders or otherwise make his case." Sowards & Mofsky, *Corporate Take-over Bids: Gap in*

Senator Williams thereafter introduced a new bill, S. 510, 90th Cong., 1st Sess. (1967). That bill would have provided for a confidential filing by the tender offeror with the Commission five days prior to commencement of the offer. Stock exchange officials and other industry representatives testified against that pre-commencement filing requirement on the ground that such requirements have deleterious market effects, including the potential for market disruption, shareholder confusion, and insider trading. See, *e.g.*, *Senate Hearings at* 71-76, 84-85, 87-89, 98, 105, 108-111, 139-140, 151 and 163. For example, Donald J. Calvin, Vice President of the New York Stock Exchange, testified (*id.* at 72):

> If word of the impending offer becomes public, the price of the stock will rise toward the expected tender price. Thus, the primary inducement to stockholders—an offer to purchase their shares at an attractive price above the market—is lost, and the offeror may be forced to abandon its plans or to raise the offer to a still higher price. The cost of an offer to purchase hundreds of thousands of shares might prove prohibitive if the price had to be increased only a few dollars per share.

The Senate's rejection of a pre-commencement filing requirement was explained in the Senate Report as follows:

> At the hearings it was urged that this prior review was not necessary and in some cases might delay the offer when time was of the essence. In view of the authority and responsibility of the Securities and Exchange Commission to take appropriate action in the event that inadequate or misleading information is disseminated to the public to solicit acceptance of a tender offer, the bill as approved by the committee requires only that the statement be on file with the Securities and Exchange Commission at the time the tender offer is first made to the public.

Federal Securities Regulation, 41 St. John's L. Rev. 499, 514 (1967) (quoting M. Cohen, Address to the American Society of Corporate Secretaries, Inc., June 28, 1966).

Senate Report at 4; see also *Great Western United Corp. v. Kidwell, supra*, 577 F.2d at 1283 n.55. Similarly, when the House considered the companion bill in 1968, it also rejected the imposition of a pre-commencement filing requirement.[15] After elimination of any advance disclosure requirement, S. 510 was enacted as the Williams Act.

During deliberations on the 1970 amendments to the Williams Act, Pub. L. No. 91-567, 84 Stat. 1497 *et seq.*, the House subcommittee again considered and rejected proposals for pre-commencement disclosure by tender offerors. The proposed House bill, H.R. 4285, 91st Cong., 2d Sess. (1970), would have required a tender offeror to provide 30 days' advance notice to both the Commission and the subject company.[16] The House bill was not reported out of the subcommittee. Instead, the Senate amendments to the Williams Act were adopted, and they did not contain a requirement of pre-commencement notification.[17]

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[15] The House bill, H.R. 14475, 90th Cong., 2d Sess. (1968), contained the pre-commencement filing requirement that was included in S. 510 as originally introduced. This provision was again criticized on the ground that it would cause market disruptions (see, *e.g.*, *House Hearings* at 44-46, 50), and the House ultimately enacted S. 510, from which, as noted above, the Senate had deleted the pre-commencement filing requirement.

[16] *See Investor Protection in Corporate Takeovers—Increase in 'Regulation A' Exemption: Hearings on H.R. 4285, S. 3431 and S. 336 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 6-7 (1970). During the hearings, the Commission supported S. 3431, which did not contain an advance notice provision. See *id.* at 21 (statement of Chairman Budge).

[17] See S. Rep. No. 91-1125, 91st Cong., 2d Sess. (1970). In addition, two bills introduced in the 94th Congress would have amended the Williams Act to require a filing with the Commission 60 days before commencement of the offer. S. 2522, 94th Cong., 1st Sess. § 3 (1975); H.R. 10650, 94th Cong., 1st Sess. § 3 (1975). A third bill would have required such a filing, and its transmission to the subject company, at least 21 days prior to commencement. H.R. 14317, 94th Cong., 2d Sess. § 5 (1976). None of those bills was reported out of committee.

Thus, over a period of more than ten years, Congress has on at least six occasions considered imposing an advance disclosure requirement on tender offerors. In each instance Congress deliberately rejected such a proposal because of the danger of market disruption and a concern that advance notice would enable incumbent management to thwart tender offers to the detriment of shareholders. Congress was determined that disclosure not be converted into a weapon in the hands of incumbent management. See *Rondeau* v. *Mosinee Paper Corp.*, *supra*, 422 U.S. at 58:

> By requiring disclosure of information to the target corporation as well as the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids * * *.

In sharp contrast to the federal regulatory scheme, the Illinois statute imposes on tender offerors what is in effect a 20-day pre-commencement notification requirement.[18] Imposition by Illinois of such a requirement would bring about the very result that Congress sought to avoid.[19] In this respect, the Illinois statute stands as

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[18] See Ill. Ann. Stat. ch. 121½ §§ 137.54.E, 137.54.B (Smith-Hurd Cum. Supp. 1980).

[19] Unlike the Illinois statute—which delays indefinitely the commencement of a tender offer until the bidder has complied with the statute's pre-commencement filing and review provisions—the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. 18a, merely precludes a bidder from purchasing tendered shares until it has received clearance from the Federal Trade Commission and the Department of Justice, both of which must act within a carefully limited time frame. 15 U.S.C. 18a(a). It does not delay the commencement of the offer or the tendering of shares to the bidder's escrow agent. Moreover, the Hart-Scott-Rodino Act does not require, as does the Illinois statute, that the bidder make a public announcement of the material terms of its offer in the pre-commencement period. To the contrary, the Act provides for confidential treatment of the bidder's filing. 15 U.S.C. 18a(h).

an obstacle to the accomplishment and execution of Congress' full purposes and objectives as embodied in the Williams Act, and accordingly is preempted. See E. Aranow, H. Einhorn & G. Berlstein, *Developments in Tender Offers for Corporate Control* xix (1977) (remarks of Senator Williams).

II. THE ILLINOIS BUSINESS TAKE-OVER ACT IS INVALID UNDER THE COMMERCE CLAUSE

At least since this Court's decision in *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1852), "it has been clear that 'the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States * * *. [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.' " *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-371 (1976), quoting *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946). Thus, the Commerce Clause permits only incidental regulation of interstate commerce by the states (*Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 199 (1925)), and then only to the extent that such regulation serves legitimate local interests and does not impose an excessive burden on interstate commerce in relation to the putative local benefits. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). See also *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 35-37 (1980).

The Illinois statute violates these principles for two separate reasons. First, the statute purports directly to regulate interstate commerce through the exercise of extraterritorial jurisdiction. *Shafer* v. *Farmers Grain Co.*, *supra*. Second, the statute imposes a burden on interstate commerce that is clearly excessive when viewed in light of the local interests the statute purportedly serves. *Pike* v. *Bruce Church, Inc.*, *supra*.

A. The Illinois Statute Seeks Directly To Regulate Interstate Commerce

In our federal system, state governments are empowered to regulate *intrastate* securities transactions. This Court has upheld against Commerce Clause challenge the authority of states to enact "blue-sky" laws to regulate local security sales,[20] but it has rested its holdings on the fact that the transactions in question occurred within the borders of the regulating states.[21] Congress also has acknowledged the validity of traditional blue-sky laws in regulating *intrastate* transactions.[22]

However, the state law now before this Court has a far more ambitious objective. The Illinois statute purports to regulate an offer made by a Delaware corporation based in Connecticut to shareholders residing across the nation. More than 70% of those shareholders reside outside of Illinois. Illinois seeks directly to regulate these multimillion dollar interstate transactions even though they take place entirely outside of the state's boundaries. The Illinois statute thus constitutes an attempt by the state to exercise a direct and intrusive form of extra-

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[20] *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917); *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Merrick* v. *N.W. Halsey & Co.*, 242 U.S. 568 (1917).

[21] See, *e.g.*, *Hall* v. *Geiger-Jones Co.*, *supra*, 242 U.S. at 557, where this Court observed (emphasis in the original):

> The provisions of the law * * * apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed * * *, they are only affected by the requirement of a license of one who deals in them *within* the State.

[22] In explaining the savings clause in Section 18 of the Securities Act of 1933, 15 U.S.C. 77r, the House Report emphasized that the clause "carefully preserves the jurisdiction of State security commissions to regulate transactions *within their own borders.*" H.R. Rep. No. 85, 73d Cong., 1st Sess. 10 (1933) (emphasis added). It was this form of local regulation that Congress sought to "save * * * from preemption" through the savings clause in the Securities Exchange Act. *Leroy* v. *Great Western United Corp.*, *supra*, 443 U.S. at 182 n.13.

territorial jurisdiction that would block sales of securities beyond its borders.

This Court has long emphasized that no state may directly regulate commerce in other states.[23] In *Shafer* v. *Farmers Grain Co., supra*, 268 U.S. at 199, the Court held that

> a state statute which by its necessary operation directly interferes with or burdens * * * [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted.

See also *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976) ("[t]he common thread of * * * [cases such as *Shafer*] is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation"). Similarly, this Court in *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 775 (1945), struck down on Commerce Clause grounds a state law where the "practical effect of such regulation is to control * * * [conduct] beyond the boundaries of the state * * *."[24]

Like the laws struck down in *Shafer* and *Southern Pacific*, the Illinois statute represents "an attempt by the State to prescribe rules under which an important part of * * * [interstate] commerce shall be conducted." *Shafer* v. *Farmers Grain Co., supra*, 268 U.S. at 201. Because it purports directly to regulate conduct occurring wholly outside the state, the Illinois statute lacks pre-

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[23] Although in Commerce Clause cases this Court occasionally undertakes a balancing approach (see, *e.g.*, *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945)), "more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens" on interstate commerce. *Pike* v. *Bruce Church, Inc., supra*, 397 U.S. at 142, citing *Shafer* v. *Farmers Grain Co., supra*.

[24] The limits on a state's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977). See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980).

cisely that feature that validated the blue-sky laws this Court previously has upheld, and upon which Congress based its approval of such laws.[25] The Commerce Clause precludes the application of a statute such as the Illinois takeover law to commerce that takes place outside the enacting state's borders, whether or not the interstate commerce has effects within the state. *Shafer* v. *Farmers Grain Co., supra*, 268 U.S. at 199-203.

B. The Illinois Statute Imposes Burdens On Interstate Commerce That Greatly Outweigh Any Putative Local Benefits

Even when a state statute regulates interstate commerce only incidentally or indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests furthered by the statute. *Pike* v. *Bruce Church, Inc., supra*, 397 U.S. at 142. Moreover, this Court in Commerce Clause cases has looked to whether the local interests assertedly furthered by the statute "could be promoted as well with a lesser impact on interstate activities." *Ibid.*; see also *Great Western United Corp.* v. *Kidwell, supra*, 577 F.2d at 1285.

1. *The Illinois statute imposes weighty burdens on interstate commerce*

The most obvious burden that the Illinois statute imposes on interstate commerce arises from what the court of appeals described as the statute's preclusive impact (J.S. App. 28a-29a; footnote omitted):

> Once the Act has been invoked, all purchases, or offers to purchase by the offeror, of the target company's stock pursuant to a tender offer may be halted, including transactions to be executed entirely

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[25] See notes 20-22, *supra*, and accompanying text. The savings clause in the Securities Exchange Act of 1934, 15 U.S.C. 78bb(a) (see note 6, *supra*), is understood to have preserved only the traditional jurisdiction of state securities commissions. See I L. Loss, *Securities Regulation* 156 & n.89 (1961); Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 Cornell L. Rev. 213, 247 (1977).

> outside the boundaries of Illinois. The Illinois Act thus possesses a significant potential to cause commercial disruption. For example, had the Secretary of State not been enjoined from going forward in the instant case, over 23 million dollars of interstate commerce would presumably have been affected.

See also *Great Western United Corp.* v. *Kidwell, supra*, 577 F.2d at 1286 ("[i]n this case, * * * [the state's] law halted over 31 million dollars of interstate commerce"). Illinois enforces obedience to its statute with substantial civil and criminal sanctions, and an exercise of long-arm jurisdiction. See Ill. Ann. Stat. ch. 121½, §§ 137.62-137.68 (Smith-Hurd Cum. Supp. 1980).

The threat of widespread "commercial disruption" is inherent in the Illinois statute because of its unlimited extraterritorial reach. As applied in this case, the statute purports to grant Illinois the right to determine when, if ever, a nationwide tender offer made to shareholders—more than 70% of whom reside outside of Illinois—can proceed. Illinois thus has arrogated to itself authority to block tender offers not just in that state in accordance with traditional blue-sky law (see notes 20-22, *supra*, and accompanying text), but in every other state.[26]

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[26] The Illinois statute empowers a single state official to block tender offers that, in the judgment of that official, are "inequitable." The impact on the economy of such permanent blockages of tender offers can be substantial. Not only are shareholders across the country deprived of the opportunity to sell their shares at a significant premium, but the incumbent management of subject companies is entrenched and effectively immunized from challenge. If, however, shareholders are permitted freely to tender their shares in situations in which they elect to do so, a tender offer allows economic resources to gravitate to their highest valued use in the hands of a successful bidder. Inefficient management may thus be replaced, and the productive capacity of the acquired firm may be combined within a new economic complex, subject to federal antitrust standards. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 319 (1962); see also pages 10-11, *supra*. This reallocation of resources to their highest valued use through tender offers can serve as a stimulus to efficiency and competition, goals

Moreover, the burden on interstate commerce is not limited to that resulting from the Illinois statute operating in isolation. Other states with such statutes can assert overlapping jurisdiction with respect to a tender offer. In this case, for example, the subject company attempted to invoke the Pennsylvania takeover law.[27] Exposure to complex and divergent state requirements necessarily renders a tender offeror's task of complying with all applicable laws extremely difficult. The problem is particularly acute in the tender offer context where "time [is] of the essence." Senate Report at 4; see *Kennecott Corp.* v. *Smith*, 507 F. Supp. 1206, 1224 (D.N.J. 1981), appeal pending, No. 81-1679 (3d Cir., filed Apr. 1, 1981).

Finally, enforcement of the pre-commencement notification and filing provisions of the Illinois statute can disrupt the orderly functioning of the nation's secondary securities markets. The Illinois statute requires a tender offeror to announce publicly the material terms of its

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fundamental to both the Commerce Clause and federal antitrust legislation. Moreover, the ever-present possibility of a takeover provides incumbent management with continuous incentives to perform effectively, thus overcoming the inertia implicit in unchallenged corporate control. See H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976).

[27] See J.S. App. 3a-4a. As the court of appeals recognized (*id.* at 29a n.31), the Illinois statute has a comity provision exempting from the statute's registration and filing requirements a tender offer that is being regulated by another state. Ill. Ann. Stat. ch. 121½, § 137.53 (Smith-Hurd Cum. Supp. 1980). For this provision to be applicable, however, the Secretary of State must find that the other state's takeover law is being applied and accords Illinois shareholders protections "substantially equal" to those provided by the Illinois statute. *Ibid.* The statute does not specify what constitutes substantial equality. See J.A. H-2. Moreover, it is rarely clear at the outset of a tender offer whether a state's takeover statute will apply. Indeed, in this case the Pennsylvania Securities Commission did not determine that it would not enforce the Pennsylvania takeover statute against MITE's proposed tender offer until nine days after being petitioned by the subject company to do so (J.S. App. 4a).

offer and then to wait 20 business days before commencing the offer.[28] Despite this public announcement, the tender offer may never be consummated if the offeror does not obtain state regulatory approval in the pre-commencement period. The resulting uncertainty and delay increases the likelihood of irregular price and volume fluctuations in the securities of both the offeror and the subject company.[29] Since the functioning of the nation's secondary securities markets unquestionably constitutes interstate commerce,[30] the operation of the Illinois statute imposes substantial burdens on that commerce. See *Canadian Pacific Enterprises (U.S.), Inc.* v. *Krouse*, 506 F. Supp. 1192, 1203 (S.D. Ohio 1981), appeal pending, No. 81-3083 (6th Cir., filed Feb. 17, 1981).

2. *The Invalidated Provisions of the Illinois Statute Are Not Necessary To Serve Local Objectives*

The two local objectives cited by appellant are insufficient to justify the burdens imposed on interstate

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[28] See note 18, *supra*.

[29] These disruptive effects were noted by Donald Calvin, Vice-President of the New York Stock Exchange, in testimony submitted during the passage of the Ohio takeover statute, which has an advance disclosure provision similar to that of the Illinois statute:

> During the 20-day [waiting] period there could be rumors, counter-offers and rumors of counter-offers which may result in price fluctuations to the extent that the market in the stock would be disrupted. This may make it necessary for the Exchange to temporarily halt trading in the stock. * * * The impact of the Ohio law would thereby be felt by investors throughout the Nation who would be deprived of a market for the securities they hold in the Ohio company.

Statement by the New York Stock Exchange on the proposed Ohio takeover statute, quoted in Sommer, *The Ohio Takeover Act: What Is It?*, 21 Case W. Res. L. Rev. 681, 700 (1970). See also pages 14-17, *supra*; *Great Western United Corp.* v. *Kidwell*, *supra*, 577 F.2d at 1283 n.55.

[30] See Section 2 of the Securities Exchange Act of 1934, 15 U.S.C. 78b.

commerce by the Illinois statute. Appellant argues (Br. 25) that Illinois seeks to protect resident security holders. He also contends (Br. 25-27) that Illinois, through its takeover law, is simply regulating the "internal affairs" of companies incorporated under Illinois law. Neither asserted interest, however, affords substantial support to the statute.

a. Protecting local investors is a legitimate state objective. However, the Illinois statute does not significantly further that objective. Consequently, the court of appeals was correct in concluding that "the benefits flowing to Illinois shareholders from the Act are, to a significant degree, speculative" (J.S. App. 26a); see also *Great Western United Corp.* v. *Kidwell*, *supra*, 577 F.2d at 1285. Moreover, even if the statute could be viewed as promoting local investor protection in some measure, the statute has a far broader reach than is needed to serve that interest.

The Illinois statute seeks to protect shareholders of the subject company by requiring disclosures regarding the offer and by according shareholders withdrawal, proration and equal consideration rights. However, because the Williams Act provides essentially the same substantive protections as those embodied in the Illinois statute, the state law provides little, if any, protection that was not guaranteed to all shareholders ten years before its enactment.[31] Likewise, it is questionable whether the additional disclosures called for by the Illinois statute, beyond those already mandated by Congress and the Commission under the Williams Act, significantly improve shareholders' ability to reach informed investment decisions.[32]

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[31] Compare Ill. Ann. Stat. ch. 121½, § 137.59.C, D, E (Smith-Hurd Cum. Supp. 1980) (withdrawal, proration and equal consideration rights) with 15 U.S.C. 78n(d)(5), (6), (7) and 17 C.F.R. 240.14d-7 (same). See also J.S. App. 11a.

[32] As the Fifth Circuit observed in *Great Western United Corp.* v. *Kidwell*, *supra*, 577 F.2d at 1280-1281, additional mandatory

Even if the Illinois statute may be viewed as promoting local investor protection to some degree, the statute is far too broad to be justified on such a theory. The statute applies to any tender offer for a substantial number of the shares of any corporation that meets any two of the following conditions: (a) the corporation has its principal executive office in Illinois; (b) the corporation is organized under the laws of Illinois; or (c) the corporation "has at least 10% of its stated capital and paid-in surplus represented in" Illinois. Ill. Ann. Stat. ch. 121½, § 137.52.10 (Smith-Hurd Cum. Supp. 1980).[33] As a result, the Illinois statute can apply to a tender offer even if none of the subject company's shareholders reside in Illinois and no securities transactions take place in that state. But as the Fifth Circuit noted in *Great Western United Corp.* v. *Kidwell, supra*, 577 F.2d at 1283, 1285, a state has no legitimate interest in protecting nonresident investors if securities transactions do not take place within the state or substantially affect local investors.

b. As a second justification for the Illinois statute, appellant argues (Br. 25-27) that authority to enact the statute is inherent in the state's power to regulate the "internal affairs" of companies incorporated under Illinois law. This argument fails because (1) the Illinois statute is not designed to regulate the internal affairs of Illinois companies; and (2) the statute applies to corporations incorporated in other states and having their principal place of business in other states.

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disclosures may actually confuse investors and obscure relevant information. See also *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 448 (1976), noting that "[s]ome information is of such dubious significance that insistence on its disclosure may accomplish more harm than good." The Court added that a requirement that management "bury the shareholders in an avalanche of trivial information * * * is hardly conducive to informed decisionmaking." *Id.* at 448-449.

[33] The Illinois statute also applies if 10% of the outstanding shares of the subject company are held by Illinois residents.

The "internal affairs doctrine" is a conflict of laws concept based on the recognition that a corporation would be greatly hampered in conducting its affairs if by doing business in more than one state it subjected itself to multiple and possibly inconsistent laws governing its internal relationships and activities.[34] Consistent with this rationale, the doctrine pertains to activities within the corporation and the relations between the corporation, its officers and directors, and its shareholders. The doctrine does not apply to relationships between shareholders and third parties, such as those arising from a tender offer. Accordingly, the Fifth Circuit in *Great Western United Corp.* v. *Kidwell*, *supra*, 577 F.2d at 1280 n.53, correctly concluded that a tender offer does not implicate the internal affairs doctrine.[35] While there may well be some internal affairs issues arising from a tender offer that could be regulated by a state, the Illinois statute addresses none of the issues touching upon the internal affairs of an Illinois subject company. Indeed, the statute's exclusive focus on transactions between shareholders and third parties *ipso facto* removes it from the category of "internal affairs" regulation.

Finally, the Illinois statute purports to regulate tender offers for the shares of corporations that are not incorporated in Illinois and have their principal place of business in other states (see note 33, *supra*). Thus, even if the Illinois legislature actually sought to govern the internal affairs of domestic corporations, the Illinois statute, which reaches companies incorporated elsewhere, has a

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[34] *Restatement (Second) of Conflict of Laws* § 302, Comment b at 307-308 (1971). The doctrine thus furthers the same principles of free trade that underlie the Commerce Clause by facilitating interstate or multi-state business by corporations.

[35] See also *Restatement (Second) of Conflict of Laws*, *supra*, § 302, Comment e at 310, which cites the transfer of stock as an example of matters that are not within the scope of "internal affairs regulation."

broader scope than can be justified on the basis of that interest.

In short, appellant has wholly failed to cite a substantial state interest, which could not be achieved by less burdensome legislation, that justifies the obstructive effect of the Illinois Business Take-Over Act on interstate commerce. The Illinois statute therefore fails to satisfy the requirements of the Commerce Clause and was correctly invalidated by the courts below. See *Kassel* v. *Consolidated Freightways Corp.*, No. 79-1320 (Mar. 24, 1981), slip op. 7, 14-15; *id.* at 1-2 (Brennan, J., concurring).[36]

[36] Like the court of appeals (J.S. App. 22a n.25), we express no view about the constitutionality of provisions of the Illinois statute other than those discussed in this brief. We note that the Illinois statute contains a severability provision (Ill. Ann. Stat. ch. 121½, § 137.70.D. While interpretation and application of that provision are, of course, a matter of state law, the general rule is that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently ofthat which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932).

Likewise, we express no view in this brief on the constitutional validity of takeover statutes enacted by other states, which may contain provisions differing from those of the Illinois statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Supreme Court of the United States

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No. 80-1188

JAMES EDGAR,

Appellant,

v.

MITE CORPORATION AND MITE HOLDINGS, INC.,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE COMMONWEALTH OF VIRGINIA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S POSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1188

JAMES EDGAR,

Appellant,

v.

MITE CORPORATION AND MITE HOLDINGS, INC.,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

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BRIEF FOR THE COMMONWEALTH OF VIRGINIA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S POSITION

I.

INTEREST OF *AMICUS CURIAE*

The Commonwealth of Virginia has a substantial interest in the outcome of this litigation. In 1968, Virginia's General Assembly enacted the Take-Over-Bid Disclosure Act. Va. Code Ann. §§ 13.1-528 to -541 (1978 Repl. Vol.). This Act was the first of its kind, antedating even the Williams Act, which Congress passed later in the same year. The Virginia Act is very similar to the Illinois statute that is at issue in the case at bar. Ill. Ann. Stat. ch. 121½ §§ 137.51-137.70 (Smith-Hurd

Cum. Supp. 1980). Both Virginia and Illinois have statutory provisions that require a twenty-day cooling off period.[1]

II.
SUMMARY OF ARGUMENT

In 1979, the Securities Exchange Commission [hereinafter "SEC"] proposed numerous regulations to supplement the Williams Act. These proposed regulations were adopted and became effective in 1980. These regulations are in excess of the Commission's jurisdiction and are therefore void. Accordingly, this case should be decided on the issue of whether the Williams Act preempts state statutes.

The Supremacy Clause of the United States Constitution does not preempt the Illinois takeover statute as being inconsistent with the Williams Act. In 1968, Congress passed the Williams Act, which sets out a broad policy for persons desiring to takeover an ongoing corporate business. The legislative history of the Williams Act is void of any language that implies or expresses Congress' intent to preempt any State regulation of tender offers. Furthermore, there does not exist any direct or indirect conflict between the Illinois takeover statute and the provisions found in the Williams Act relating to tender offers. Therefore, the Illinois statute is not violative of the federal takeover statute.

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[1] Ill. Stat. Ann. ch. 121½ § 137.54E (Smith-Hurd Cum. Supp. 1980) provides:

> A take-over offer shall become registered 20 business days after the date of filing the registration statement or an Amendment thereto with the Secretary. . . .

Va. Code Ann. § 13.1-531(a) (1980 Cum. Supp.) provides:

> No offeror shall make a take-over bid unless at least twenty days prior thereto he shall file with the Commission and with the registered agent of the offeree company a statement containing all the information required by § 13.1-531(b) or a Schedule 14D-1. . . .

III.

ARGUMENT

A. The SEC Lacks Authority to Supersede the Illinois Statute by Adopting Regulation 14D

The Illinois takeover statute and the Williams Act have identical goals and purposes underlying their respective legislation. "The sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer." *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 35 (1977). The foremost purpose of the Illinois takeover statute is the adequate protection of securityholders.

> The purpose of this Act shall be to protect the interests of Illinois securityholders of companies having a close connection with this State without unduly impeding take-over offers, and this Act shall be interpreted so as to strike a balance that does not favor either management of a target company or an offeror.

Judicial review of agency action requires the reviewing court to set aside informal rulemaking that is in excess of its statutory jurisdiction. 5 U.S.C. § 706(2). Under this standard it is clear that the SEC may not issue regulations which exceed its authority. To uphold the validity of Regulation 14D, this Court must "reasonably be able to conclude that the grant of authority contemplates the regulation issued." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 308 (1979). Because Regulation 14D contemplates the preemption of the Illinois takeover statute, this Court should probe the language and reasoning of the enabling legislation. *Chrysler*, 441 U.S. at 308.

The language, logic and history of the Williams Act does not suggest that Congress intended preemption, but instead suggests collaboration between the State and federal governments. The SEC appears to realize this fact, and also that it lacks authority to promulgate rules which are preemptive of State takeover statutes. In early 1980, before Regulation 14D became effective, the SEC sent legislation to Congress which, if enacted, would preempt State takeover statutes. It urged Congress to adopt its proposals because it had concluded that

"only Congress can quickly and precisely establish the bounds within which the national policy requires the exclusion of all but the national law."[2] The attitude of the SEC, as reflected by the promulgation of Regulation 14D, conflicts with the express wishes of Congress. *See* § 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a).

Regulation of securities is an area of the law that the States occupied long before the federal government began to legislate. *See Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917) (the Ohio "Blue Sky Law" examined as to its constitutionality). Whenever the subject matter concerns an area of the law that has been traditionally occupied by the States, there is an assumption that the State statute in question should not be ousted unless Congress so intended. *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This assumption would likewise be applicable to any regulation promulgated by a federal agency. In *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945), the Court was concerned with whether or not the Interstate Commerce Commission could, pursuant to its enabling statute, promulgate certain preemptive regulations. The Court held that "Congress . . . will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested. . . ." *Southern Pacific Co.*, 325 U.S. at 766.

The Illinois and Virginia Acts are designed to insure full and fair disclosure to the securityholder of all the material information, so that if and when the securityholder does accept the offer, he will be trading with adequate information and at a price that reflects the intention of the bidder to effect a takeover. Part of this informational process allows the target company an adequate opportunity to defend its position and express its views to the shareholder. *See* 17 C.F.R. § 240.14e-1(a) (1980); 44 Fed. Reg. 70,338 (1979). Yet, the SEC has made only a token recognition of this valuable interest. The SEC has overlooked the fact that the securityholder's original investment was an expression of trust in the management of the target company. As a corollary to this, the target company has a fiduciary duty to protect the company from industrial pirates and asset strippers. *See, e.g., McCandless* v. *Furland*, 296 U.S.

[2] Letter from SEC Chairman Williams to Senator Proxmire, 542 BNA Sec. Reg. & L. Rep. 19 (Feb. 27, 1980).

140 (1936); *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U.S. 371 (1894). The SEC regulation shifts the delicate balance between the bidder and the target company in favor of the bidder at the expense of the securityholder.

B. The Supremacy Clause Does Not Vitiate the Illinois Takeover Statute

When the Williams Act was passed, it was Congress' intent to provide adequate disclosure of all pertinent and material information by the offeror to the target company and to the shareholders of that company. The act was designed to give protection to the investors of the target company. *See* H. Rep. No. 90-1711, 90th Cong., *reprinted in* [1968] U.S. Code Cong. & Ad. News 2811-2815. Nowhere within the Act itself or its legislative history is there language that would suggest Congress intended to supplant state regulations of state securities. In *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 137 (1973), the Court held that:

> Congress in the securities field has not adopted a regulation system wholly apart from and exclusive of state regulation ... Instead, Congress intended to subject the exchanges to state regulation that is not inconsistent with the federal act.

The Williams Act is no more than a minimum disclosure statute with moderate substantive protections for shareholders. It makes no attempt to regulate all aspects of tender offers. Even if the Act were comprehensive in character, that fact would not be determinative of the issue. In *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 429-30 (1963), the Court noted "that the validity of [the preemption claim] cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation. ..."

Regulation of securities is an area in which the state and federal governments have long coexisted. In fact, state regulation of securities existed before any federal legislation was ever enacted. *See, e.g., Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917) (the Ohio "Blue Sky Law" examined as to its constitutionality). Securities regulation has been and still is a traditional area of state concern. Whenever a preemption issue concerns a subject matter that has been traditionally occupied

by the States and not the federal government, there is an "assumption that the historic police powers of the States [are] not to be [ousted] by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

As further evidence that the Williams Act does not preempt state regulations, § 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), provides:

> [N]othing in this chapter shall affect the jurisdiction of the securities commission . . . of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

This "section was plainly intended to protect, rather than to limit, state authority." *Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 182 (1979). *See also* Hearings on S. Res. 84 (72d Cong.), 56, and 97 (73d Cong.) before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., 6577 (1934).

IV.

CONCLUSION

For the abovementioned reasons, the Commonwealth of Virginia respectfully prays that this Honorable Court reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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